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IN THE

Supreme Court of the United States.

ALICE I. BIRRELL,
original plaintiff
and
plaintiff in error,

against

THE NEW YORK AND HARLEM RAILROAD COMPANY and THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
original defendants
and
defendants in error.

October Term, 1904.
No. 202.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case before this Court.

This case comes up upon a Writ of Error to the Supreme Court of the State of New York, allowed by Chief Judge Parker of the Court of Appeals to review a final judgment entered upon a decision of the Court of Appeals reversing a judgment of the Appellate Division of the N. Y. Su-

preme Court, affirming a judgment at Trial Term in Equity in favor of the plaintiff.

This is one of what are known as the *Viaduct* cases, founded upon the claims of abutting property owners growing out of the construction of the Fourth Avenue Viaduct or Elevated Railroad in New York City, by the N. Y. & Harlem Railroad Company, and the questions raised upon this appeal are substantially the same as arose and were decided in the *Muhlker* case, No. 99, this term of Court, decided April 10, 1905.

The question raised and determined in that case and in this one is whether Chapter 339 of the Laws of New York of 1892, as interpreted by the Court of Appeals of that State, or the authority exercised thereunder, is constitutional in so far as it required the construction of the viaduct in question and the taking of the easements of abutting property owners without compensation.

The Court of Appeals decided in the present case and in the *Muhlker* case that the Act and the exercise of the authority to appropriate such easements thereunder was constitutional and that such easements might be taken without compensation because the construction of such viaduct was a public work performed by command of the State. In the *Muhlker* case this Court overruled the Court of Appeals in that respect and reversed the judgment, remitting the cause to the N. Y. Supreme Court for further proceedings.

Statement of the Pleadings Below.

This action was begun on the equity side of the Supreme Court of New York on January 27, 1897, by the service of a summons and complaint. The

complaint showed that the plaintiff was the owner of a lot with a building thereon situated on the northeast corner of Park Avenue and 123rd street, Manhattan, New York City, that said Park avenue had been opened as a public street under Chapter 86 of the Laws of 1813 and amendatory statutes; that by street opening proceedings and the statutes, the title to the street was acquired and is held by the City of New York in trust to be appropriated and kept open as a street; that the plaintiff is possessed of easements appurtenant to said premises to have the avenue kept open and used in like manner as other public streets and avenues, and that there are attached to said premises easements of light, air and access, over the avenue, for the benefit of the premises and of the plaintiff which have been so attached during her time and that of her predecessor in title; that the defendant the Harlem Railroad was operating a steam railroad on the avenue prior to April 1, 1873, when it leased the same to the New York Central and Hudson River Railroad for a term of 401 years; that subsequently to that lease the defendants, without right or authority, as against the plaintiff or her predecessors excavated Park avenue and constructed a railroad in the cut and that about April, 1893, they erected the viaduct in question, on which they are operating and intend permanently to operate their railroad, whereby the premises have been and will be deprived of easements of light, air, access, privacy, stability, quiet and other rights, without the consent of the plaintiff and without compensation to her. The prayer demanded damages for the trespasses already committed and an injunction for the future.

The answers of the two railroad companies were the same and admitted the street opening proceedings and that Park avenue was a street held in trust and that defendants were operating a steam railroad thereon; but denied the street use or trust as to the portion of the street occupied by the railroad; alleged the title of the defendants to the fee of a twenty-four foot strip in the center of the avenue, and set up as an affirmative defense that the viaduct was erected and operated in compliance with the Act of April 19, 1892, of the New York Legislature. The answers also set up the various statutes of limitation and a claim to title by prescription.

Prior to the trial in this case and in February, 1900, the Court of Appeals in the case of Lewis *v.* the Harlem R. R. Co. had unanimously affirmed a judgment against the defendants in an action by an abutting property owner substantially identical in form and substance with the present case.

Lewis *v.* Harlem R. R. Co., 162 N. Y. 202.

This case was tried and decided by Mr. Justice Lawrence who filed his findings and decision, January 14, 1901.

The trial judge found that by decree in Chancery dated December 28, 1832, the Harlem Railroad became the owner of a strip of land twenty-four feet wide running north and south through the centre of Park Avenue in front of plaintiff's premises and upon that strip had the right to erect the present viaduct structure. He also found that by reason of the lapse of time and acquiescence of the plaintiff and by virtue of all the acts and proceedings in the premises the de-

fendant companies had acquired the right to use and operate the remaining part of the railroad as it was prior to August 1894 maintained and operated in a cut along the centre of the avenue about fifteen feet in depth and fifty feet in width; that in compliance with the Act of 1892 and under the supervision of the Park Avenue Improvement Board, the present viaduct structure was erected, being about 21 feet 9 inches in height and varying from 60 feet 10 inches in width at the south end of the plaintiff's premises to 75 feet feet 3 & ½ inches in width at the northerly end; that defendants began to operate their trains on said permanent structure on February 16, 1897 and intend to continue said operation; that such permanent structure and operation are trespasses upon plaintiff's easements of light and air appurtenant to the premises, whereby the fee value has been depreciated in the sum of $7050 and that the loss of rental value was $3360. These damages referred solely to that part of the roadway not included in the strip of twenty-four feet and were over and above all benefits conferred upon said premises by the erection and operation of the viaduct, as compared with the former structure (*Record, p.* 17 *Decision par. sixth;* opinion of Judge Lawrence, record, p. 21).

Upon this decision judgment was entered January 14, 1901, for the amount of rental damage and costs and for an alternative injunction in case the sum of $7050 fee damage was not paid; the plaintiff to furnish an appropriate grant or conveyance of the right to operate and maintain the structure on payment of the same and either party to have leave to move at the foot of the judgment for further directions.

The defendants excepted to the decision and

appealed to the Appellate Division of the Supreme Court, consisting of five Judges and being the final tribunal in the State of New York on matters of fact, and there the judgment was affirmed with costs without opinion (*60 App. Div., 630*), Mr. Justice Van Brunt dissenting.

The defendants then appealed to the Court of Appeals where the judgment was reversed and the complaint dismissed without costs upon the authority of *Fries vs. N. Y. & H. R. R. Co.*, 169 N. Y., 270, decided December 31, 1901, which limited the *Lewis Case*, 162 N. Y., 202, wherein a similar judgment in favor of plaintiff had been unanimously affirmed and which had theretofore been regarded as a complete and absolute authority in this line of cases. The *Fries* case was decided by a majority of the Court, Judge Cullen, the present Chief Judge, dissenting in a strong opinion, concurred in by Judges Bartlett and Vann; said three dissenting Judges holding that the defendants were liable and that the judgment appealed from should be affirmed following the Lewis case.

The Court of Appeals, in its judgment directing the dismissal of this case, stated,

> "That in said suit or action there was drawn in question the validity of Chapter 339 of the Laws of 1892, and the Acts amendatory thereof, and all the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States and particularly to Sec. 1 of Art. 14 and the amendments thereto, and of Sec. 10, Art. 1 thereof, and thereupon the decision of this Court of Appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

How The Constitutional Question Comes Up.

The complaint simply alleges the plaintiff's title to the property and easements, and trespasses committed and leaves the defendants to make such defense and answer as they see fit. The answer of the defendants alleges the New York Act of 1892 under which they claim the right to appropriate the easements without compensation and upon which that claim was sustained in the Court of Appeals. Under the New York practice nothing further could appear in the pleadings. A plaintiff is not allowed to reply to an answer unless he has a counterclaim and there was no counterclaim here. (*Code Civ. Pro., Sec.* 514), but every allegation of new matter in the answer in such a case is deemed to be controverted by the adverse party (*Code Civ. Pro., Sec.* 522). The result of this system of practice is that it "secures "to the plaintiff the benefit of every possible "answer to the defense made by way of new mat- "ter, not constituting a counterclaim as fully as "though it were alleged in the most perfect man- "ner." (*Arthur* v. *Homstead Fire Ins. Co.*, 78 N. Y., 462, 467).

The unconstitutionality of the State statute in so far as it operated to deprive the plaintiff of compensation for her easements was assumed in the Supreme Court by the trial Judge and by the Supreme Court Appellate Division. It was presented to the Court of Appeals and decided there as the remittitur shows and thereby the Federal question was sufficiently presented for cognizance of this Court (*Rothschild* v. *Knight*, 184 U. S., 334).

Assignment of Errors.—The errors of which the plaintiff complains herein are all fully set forth

by the assignment of errors (see Record, 67 and 70), namely, that the New York Court of Appeals held that Chapter 339 of the Laws of 1892 of the State of New York is constitutional, and that the plaintiff in error had no remedy against the defendant, and that he might be and has been deprived of his property without due process of law, and that the Court of Appeals decided in favor of the validity of the authority exercised under said statute, namely, the authority to appropriate plaintiff's easements of light, air and access, without compensation, and without due process of law. The error of the Court of Appeals is fully alleged in various forms in the said assignment of errors, so that the matter involved is fully and squarely brought before this Court for determination.

Facts of the Controversy.—The plaintiff's premises consist of a five story and basement red brick apartment house, situated on the northeast corner of 123rd street and Park avenue, Manhattan, New York City. The lot is thirty-five feet on the street and one hundred feet eleven inches on the avenue. The building is thirty-five feet front by ninety feet deep. It is a double flat house with ten apartments. One apartment has seven rooms and bath and nine apartments have eight rooms and bath each. It was built in 1882 about the time of the decision in the case of *Story v. N. Y. Elevated R. R. Co.* (90 N. Y., 122), which was supposed to secure to abutting property owners their easements of light, air and access in the streets of New York forever. There are fifty windows on the Park avenue side, twenty-four on 123rd street and twenty on the back of the building. The premises are in good repair

and have been so ever since they have been owned by the plaintiff, who purchased them in 1893.

Prior to 1872 the trains were operated on Park avenue at this point upon the surface of the road from 42nd street to across the Harlem River (about 135th street). In 1872 a cut was constructed from 49th street to the Harlem River and the trains were operated in that cut, which at 123rd street opposite the plaintiff's premises, was about fifteen feet deep (Record, p. 43). There was a parapet wall about two feet six inches high at that point at each side of the cut. At the bottom the cut was fifty feet wide and at the top, fifty feet. This cut was bridged over at 123rd street, 124th and 125th streets (Record, p. 24). A person standing on the sidewalk at the corner could just see the smokestack of a locomotive but not the tops of the cars passing through the cut.

In 1893 the work was begun of changing from the cut to the present viaduct structure. In May, 1894, they commenced to build a wooden trestle work over the cut as a temporary support to the present permanent structure and as an aid to its erection (Record, pp. 24, 25).

The present structure was put in operation February 16th, 1897. It widens from the southerly line of the plaintiff's property on Fourth avenue to the northerly line thereof. At the southerly line it is sixty feet, ten and three-quarter inches wide and at the northerly line it is seventy-five feet three and a half inches wide (Record, pp. 25, 44). The height of the structure at this point is twenty-one feet nine inches (Record, p. 44). It is built of iron or steel. There are nine iron columns supporting the structure on the street in

front of plaintiff's premises, consisting of three rows of three columns each, each column being 24 inches square (Record, p. 25). There are four tracks; two center tracks for express trains and two outside tracks for local trains.

About four hundred and seventy-five trains run over the structure a day of from four to seven cars, the cars averaging about 62 1-2 feet in length. The locomotives weigh from 70 to 90 tons (Record, p. 43).

There is a station at 125th street. The length of the southbound trains brings the locomotives opposite plaintiff's property at about the middle of the building and sometimes further on, and as these trains arrive, stop and leave again the process of firing up at the station with the usual noises attendant upon getting up steam, letting off steam, etc., produce noises additional to the ordinary running of trains (Record, p. 27). Before the viaduct structure was erected, the nuisance of the road was not nearly so great as at the present time. The trains being operated in a cut, there was not nearly so much noise, smoke, gas, nor were cinders driven against plaintiff's windows as they now are from the vantage ground of this high viaduct.

From 1893 to the present time there has been a great deal of noise, smoke, cinders and dust. Cinders by the pailful accumulate every day in the area, on the window sills and on the roof (Record, pp. 26, 27); a number of boxes of these cinders were produced in evidence (Record, p. 27), some of the size of a small hickory nut.

The noise of the operation of the trains is such as to interfere seriously with conversation (record, pp. 26, 28. 30, 31, 32, 33, 34).

The effect of the passing trains upon the light is such as to produce alternate flashes and darkening, and to interfere with reading (record, pp. 32, 34).

The effect of the vibration is very serious indeed; plaster has fallen down, the walls are cracked, one of the ceilings has fallen and chimneys have been shaken. (record, pp. 27, 30, 31, 35, 36).

A great deal of smoke and gas is produced by the engines at the station and passing, which enters plaintiff's windows, causing interference with the light and affecting the atmosphere so as to produce coughing (record, pp. 26, 31, 32, 33, 34).

A loss of rents of about $1,800 a year was shown; the trial court awarded the plaintiff rental damage at about $1,000 a year. There was evidence tending to show an impairment of the fee damage to the amount of $30,000 or upwards. The award under the rule adopted by the trial court which excluded the damages following the construction and operation of the road upon the twenty-four foot central strip was only $7,050.

History of the case before entry by the Railroad.

In 1807 by Chapter 115 of the Laws of that year, the Legislature provided for the laying out of the proposed streets and avenues in the northerly part of New York (*Plaintiff's Ex. B,* (record, p. 22), by commissioners who were directed to prepare and file a map or plan of the City.

On April 1, 1811, a map was made and filed by the Commissioners appointed under that Act (*Plaintiff's Ex. C,* (record, p. 22). A part of

this map appears in the record showing plaintiff's premises and adjoining streets including Fourth Avenue as then laid out. It was declared by the act to be conclusive as well in respect to the City as in respect to owners and occupants of houses and tenements.

The New York Courts have frequently decided that the filing of such a map pursuant to legislative authority involves a devotion of the lands designated on the map to the corporate use of the municipality or for the benefit of the corporation on whose behalf this map is filed.

Rochester, H. & L. R. Co. v. *N. Y. L. E. & W. R. Co.*, 110 N. Y., 128.
Suburban Rapid Transit R. Co. v. *Mayor, &c., of N. Y.*, 128 N. Y., 510.
Pocantico Water Works v. *Bird*, 130 N. Y., 249.

In 1813 (Chap. 86 Revised Laws) the City Charter was made to provide for the opening of streets under the Act of 1807; that such opening proceedings shall be "final and conclusive upon all the parties and upon all persons whomsoever" and that such streets, &c., should be held in "trust "nevertheless that the same may be appropriated "and kept open for, or as part of a public street, "avenue square or place forever, in like manner "as the other public streets, avenues, squares and "places in the said City are and of right ought to "be" (sec. 177). The moneys expended in the opening were to be assessed upon the parties benefited (Sec. 175). So that plaintiff and her predecessors in title were assessed to open these streets.

A copy of the material parts of these acts is contained in the supplement to this brief.

In 1830 the premises in question now owned by plaintiff were the property of Samson A. Benson an infant from whom by various mesne conveyances plaintiff derived title in 1893 (*Record*, p. 22).

In 1831 the N. Y. & Harlem Railroad Company was incorporated, by Chapter 263 of the Laws of New York, with power to construct a single or double railroad from 23rd street to the Harlem River; to transport passengers and property "*by the power and force of steam or of animals or of* "any mechanical or other power" for the term of thirty years, with power of condemnation of necessary real estate in case of disagreement, etc., the Vice Chancellor to "direct the manner of as- "certaining the damages which the owner of such "land or real estate will sustain by the occupation "thereof by the said corporation," no lands to be thus taken to exceed forty feet in width (*sec.* 10). The act further provided as follows: (*Sec.* 16). "Nothing in this Act shall be deemed to "authorize the said corporation to construct or "use their single or double railroad or way *across or along* any of the streets or avenues as designated on the map of the City of New York, *whether such streets or avenues shall have been opened or not* without the consent of the mayor, aldermen and commonalty of "said city, who are "hereby authorized to grant permission to the said corporation to construct their said railroad way *across or along* said streets or avenues, or prohibit them from constructing the same, and after the same "shall be constructed, to regulate "the time and manner of using the same, and the "speed with which carriages shall be permitted "to move on the same or any part thereof."

In October 22, 1831, the defendant filed in the office of the Register of the County of New York, a map locating the route of this railroad through Fourth Avenue (*Defendant's Ex.* 3), with which was filed a resolution of the common council, passed October 11, 1831, approving said map upon condition that the company "shall first obtain "the consent of the mayor, aldermen and com- "monalty of the City of New York before it com- "mences the construction of said road". Accordingly on December 22, 1831, an ordinance was duly approved by the mayor, authorizing the construction of the railway and thereupon such ordinance was made the subject of an agreement entered into by the defendant companies with the City by which the defendants agreed "to stand "and abide by and perform all the conditions and "requirements in said ordinance contained" (record p. 61).

By this agreement the company is permitted in pursuance of their acts of incorporation, to construct a double or single track railroad or railroads along Fourth Avenue, the width not to exceed twenty-four feet, provided that if it should appear that said railway constituted "an obstruction or impairment to the future "regulation of the City *or the ordinary use of any street or avenue,* it might be required to remove the railway." The right of regulating the description of the power to be used was reserved to the City. Further; "that said company shall make the railroad path from time to time to *conform to what may "hereafter be the regulation of the avenue and "road through which the railroad passes".* If the railroad should not be completed or should be discontinued, the strip of land was to be thrown open as a part of the public avenue.

Those rights which the City conferred upon the railroad had been described as "subject to certain "drastic conditions which gave the City supreme "control" Vann, J., in *Lewis* case, 162 N. Y, 219.

In certain litigations arising out of the enforcement of the conditions contained in these ordinances, it was held that they were valid and effectual and must be observed by the railroad companies.

N. Y. & H. R. Co. v. *Mayor &c of N. Y.*, 1 Hilton (N. Y. Com. Pleas) 562.

N. Y. N. H. & H. R. R. Co. v. *Mayor &c. of N. Y.* 4 Blatch., 193, 18 Fed. Cases 142; case No. 10199.

History of the case after entry by the Railroad.

Under the act, ordinances and agreement the railroad in 1832 entered upon the street and built a surface railroad along the street and it continued to be only a surface railroad until 1873. This is the testimony of the defendant's manager, Franklin, "Prior to 1872 the trains operated in "Park Avenue at 123rd street ran on the surface. "About 1847 they went down into the cut in front "of 123rd street" (*Record, p.* 43).

It was a modest surface railroad of the old fashioned kind with small and infrequent trains of the character which old men remember to have been used in those days.

On April 6, 1832, the N. Y. & Harlem Railroad began proceedings to acquire title to a twenty-four foot strip in the centre of Fourth Avenue in front of the plaintiff's premises. The fee at that time was in one Samson A. Benson, an infant un-

der the age of fourteen years (*see Condemnation proceedings, Def'ts'* Ex. 2, record pp. 50-58). A final decree in that proceeding was entered February 16, 1833 (record p. 58). It recites that the railroad company had located its railroad *in the centre of Fourth Avenue* with the approval of the common council (record p. 50) and that "in order to keep the line, course road or way thereof, the railroad required the fee simple of this strip, and it was finally adjudged that the railroad company should take the fee simple thereof and might enter upon, take and use the same *for the purposes of said road* (Record, p. 58).

In 1837 Chapter 274 was passed authorizing the widening of Fourth avenue to one hundred and forty feet; the statute treating the whole street as one hundred and forty feet in width notwithstanding the condemnation proceedings against the infant Benson. The language of the statute is that the map of the City of New York should be altered to show Fourth avenue as a street one hundred and forty feet in width "by adding there-"to on each side thereof twenty feet of land so as "to make the whole width of that part of said "avenue one hundred and forty feet," showing the understanding of the situation to be that the bed of the railroad should form and did form a part of Fourth avenue at that time.

By proceedings which terminated in an order confirming the report of the Commissioners on May 15, 1853, and an order of the General Term of the Supreme Court affirming that order, dated May 15, 1854, the City acquired title to the soil of Fourth avenue (record, p. 22). These proceedings included the strip of twenty-four feet in width in the center of Fourth avenue opposite the

premises in suit. A nominal award of one dollar was made the railroad in those proceedings.

In the case of *Pape v. N. Y. & H. R. R. Co.*, 74 App. Div., 175, 186, decided in the Appellate Division of the Supreme Court of New York, Mr. Justice Ingraham construed these proceedings and says: "It would seem, therefore, that after final "determination of the report of the commission- "ers the railroad company retained no interest in "this property that it had acquired from Adri- "ance (the original owner in that case) except the "right to exercise its franchise by the operation "of a railroad upon the surface of the street."

In 1872, Chapter 702 of the Laws of New York, entitled "An Act to improve and regulate the use "of Fourth avenue in the City of New York," authorized the railroad company to lay down two additional tracks and prescribed the lowering of the grade from 105th street up to 120th street and past the plaintiff's premises, with a provision for bridges and cross streets and for parapet and retaining walls, with coping and iron railings whenever the railroad ran through an open cut, the expense to be borne by the city and railroad in equal proportions.

In 1873 the lease to the N. Y. Central Railroad was made.

In 1880 plaintiff's building was erected.

In 1890 the River and Harbor Act was passed (*U. S. Statutes at Large*, Vol. 26, p. 437) requiring the elevation of the defendants bridge over the Harlem River.

In 1892 Chapter 339 of the Laws of 1892 (amended 1894, Chap., 548; 1896, Chap. 594; 1898, Chap., 613) authorized the erection of the viaduct structure in question and provided (Sec-

24)"that sai dimproved structure and bridge shall "be *exclusively for the use and purposes of the "railroad company.*"

In May, 1894, the work under this act began opposite plaintiff's premises (record, pp. 24, 25) and was terminated on February 16, 1897, when trains began to be operated on the permanent structure.

In the present action plaintiff was not allowed ot recover any damages whatever by reason of the construction or operation of the road upon the twenty-four foot strip in the center of Fourth avenue, nor by reason of the construction of the temporary structure between the years 1894 and 1897, on the theory that such construction was under the control of the State of New York. Her recovery was limited to the damage accruing and commencing on February 16, 1897, the day when the defendant companies took possession of the road.

FIRST POINT.

The decision in the Muhlker case is controlling, and requires a reversal of this judgment.

The questions presented to this Court by the writ of error and assignment of errors are substantially the same as those presented in the *Muhlker* case. The remittitur from the Court of Appeals in this case states the Federal question as follows:

> "That in said suit or action there was drawn in question the validity of Chapter 339 of the Laws of 1892, and the acts amendatory thereof and of the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States, and particularly of Sec. 1 of Art. 14 and the amendments thereto, and of Sec. 10, of Art. 1 thereof, and thereupon the decision of this Court of Appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

And the decision in this respect is made the ground of the application for the writ of error by the assignment of errors already referred to.

In the prevailing opinion of this Court, in the *Muhlker* case, it is stated, referring to the decision below:

> "The Court (of Appeals of New York) rests its ruling on one point, the effect of the Act of 1892, under which the structure complained of was erected, the Court declaring that Act a command to the railroad Company in the interest of the public; indeed made the State the builder of the new structure and use of it by the railroads mere obedience to law. But it does not follow that private property can be taken over by the erection of the structure or its use."

From this and the following language of the opinion in the *Muhlker* case it is clear and certain that the question decided in that case was the question attempted to be raised here; that is, the validity and constitutionality of Chapter 339 of the Laws of 1892 of the State of New York. The facts in both cases were the same. In both cases

the easements consisted of light and air appurtenant to premises fronting on Fourth avenue, New York City. In both cases these easements have been appropriated by the defendants without compensation, and in both cases that appropriation was attempted to be justified under Chap. 339 of the New York Laws of 1892, which directed the erection by defendants of a viaduct, in the course of which erection these easements were necessarily taken.

SECOND POINT.

Following the Muhlker decision, it must be held that the judgment of the New York Court of Appeals in this case contravenes the several provisions of the federal constitution invoked by the plaintiff in error.

The provisions of the Federal Constitution under which plaintiff in error claims the right to a review and a reversal in this Court are the two mentioned, namely, that no state shall pass any law impairing the obligation of contracts (Art. 1, Sec. 10), and that no state shall deprive any person of property without due process of law (Am. 14).

In this case the application of these several provisions is scarcely distinguishable. All three are intended and effective to protect property and property rights. A contract is property, and all property, except that of the most primitive kind,

is the result of contracts, and of services performed under contract. Substantially all property depends for its existence upon the performance of present contracts, and may be destroyed by their violation. The judgment under review sustained the validity of the state law (Chap. 339 of the Laws of 1892), which authorized the erection of the viaduct complained of, without compensation, and also sustained the acts performed and the authority claimed under it.

In the suit below there had been drawn in question the validity not only of the statute *but of the authority exercised under the same* (U. S. R. S., Sec. 709, Record, p. 1 Remittitur). By this authority exercised under the statute the property of the plaintiff was taken without compensation, and without process of law. It is not even pretended that compensation was provided, nor that there was any process of law whatever.

Now it has been held by the decision in the Muhlker case that the easements taken were in fact property. The opinion cites approvingly *Barnard* vs. *Johnson*, 15 *N. J. Eq.*, 481. and Lewis "*Eminent Domain*," Sec. 91-C
where it is stated that

> "These rights or easements of light, air and access as appurtenant to abutting lots, and that they are as much property as the lots themselves."

Similarly under the opinion in the *Muhlker* case, the effect of the New York Statute was to impair the obligation of a contract. It was held in that case that the City of New York held the street under a trust which constituted a contract to the

benefit of which plaintiff was entitled. There is no difference in substance between the situation of the plaintiff here and that of Muhlker. In both cases their predecessors in title had bought their land after Fourth Avenue had been dedicated to street uses, in a manner amounting to a contract that the street should be kept open for street purposes, forever, and in both cases the parties had purchased under the assurance of a long line of New York decisions, which had established and formulated the rights of abutting property owners upon streets, including the right to light, air and access.

In the Muhlker case the city had acquired its street rights by a deed in trust. In the present case such rights were acquired by proceedings *in invitum*, but, as was shown in the prevailing Muhlker opinion, that made no difference. Mr. Justice McKenna there points out that in the case of *Story* vs. *Met. El. R. R. Co.*, 90 *N. Y.*, 122; the City was the grantor of the plaintiff, whereas in the latter case of *Lahr* vs. *Met. El. R. R. Co.*, the land in the street had been taken from plaintiff's grantors by proceedings *in invitum*, but in both cases the Court of Appeals properly held that the "rights of abutting owners were held to rest in contract constituted by the conditions upon which the city received the property." Those conditions appear in the statutes, under which the bed of the street was taken by the city, namely; Chap. 115 of the Laws of 1807; and Chap. 86 R. S., 1813; the former of which provides that they are to be taken in trust, nevertheless, that the same be kept open for a public street, road or public square forever" and the latter of which provides that they are taken

"in trust, nevertheless, that the same may be appropriated and kept upon for or as part of a public street, avenue, square or place forever, in like manner as the other public streets, avenues, squares and places in the said city are, and of right ought to be."

THIRD POINT.

The easements of light and air taken by the defendants were the actual property of the plaintiff.

It appears to have been argued by the defendants counsel in the *Muhlker* case that these easements either were not property at all in the constitutional sense or that they were not the property of the plaintiff, and though in fact taken by the defendants as incidental to the building of the viaduct, yet the plaintiff was not thereby deprived of anything which he could call property and deprivation whereof would give him the right to appeal to this Court for constitutional protection.

This is a remarkable claim. Certainly these easements have all the attributes of property in the ordinary sense. They are capable of being used, enjoyed impaired and destroyed and under certain usual conditions of being transferred and exchanged. The mere fact that they have no value apart from the land does not detract from their quality as property. The roof may have only nominal value when considered apart from the house or when removed therefrom. The well and the water therein may have each but

nominal value when separated or the shoe may be valueless without its mate and yet each of these is property and perhaps valuable property in its proper place. The circumstance that the values of certain kinds of property can only be measured by the effect of their loss, does not in the least prevent or recognize the reality of their values when so measured. A man's right hand may have no value apart from the body; its value is only measured by its loss and yet it is none the less capable of legal ascertainment.

And not only is it clear that these easements constitute valuable property but that they are the actual property of the plaintiff. The first and in this case, the controlling proof on that subject is that the plaintiff and her predecessor in title had actually and notoriously possessed and enjoyed these easements as property and had derived revenue therefrom up to the time of the trespasses complained of. Is there any better prima facie proof of property rights than the notorious open and undisturbed and undisputed possession thereof? Such was the possession of plaintiff and predecessors of these easements from the year 1882 when this house was built, up to 1893 when the easements were taken by the defendants. During all that time the plaintiff and her predecessor had uninterrupted open and notorious enjoyment of these easements as property and was deriving large rents therefrom which are set forth in the record. Every passer-by, every agent of the defendants saw or might see this possession every day of his life.

And prior to that time the actual right to these easements existed as far back as the filing of the map by which the street was dedicated. And even

prior to that time at the moment when this lot first became the subject of private ownership there was a potential right in the owner to an easement of light and air upon whatever street his property should thereafter face, this right being founded upon the very commonest habits and customs of civilization. And this property and its notorious enjoyment was never taken from plaintiff or from her predecessors or seriously disturbed until defendants took it by the acts complained of here.

The defendant claims a prescriptive right to their railroad as actually used by them and that right as far as established is conceded; but what of plaintiff's right to these easements founded on not only in prescription but in actual possession?

The Court will look in vain for any assertion of a shadow of a claim on the part of defendants to interfere with those easements made prior to the passing of the act of 1892.

In 1807 the avenue was dedicated to the public use as a street by the statute (Laws 1807, Chap. 115).

In 1811 the map was filed pursuant to this statute, whereby the dedication of the street was perfected.

In 1831 the railroad was allowed to lay its tracks and operate its road through the center of the street by the consent of the common council under what was practically a license. As was said by Judge Vann, in the *Lewis* case (162 N. Y. 221): "It entered under a license and remained under "a license. Its unbroken continuity of possession "from that day to this has never been accompan- "ied with an assertion of any claim hostile to the "city."

In 1832 the railroad condemned the strip of land twenty-four feet wide which was all it used at that time, and on which it operated a surface railroad only.

In 1853 the City condemned that strip and took the title to it under condemnation proceedings, the road being still a surface road.

In 1872 the legislature authorized a change of grade and a four track road.

Now from 1832 to 1872, a period of 40 years, this road had been operated as an ordinary surface railroad (*Testimony of defendants' manager Franklin*, Record,, p. 43. Up to that time there had not been the slightest interference with plaintiff's easements of light and air appurtenant to these premises and very little interference with the access. It was the ordinary case of the operation of a surface railroad. Under the act of 1872 the tracks were sunk and access was interfered with, and the Courts have held that the easements of access then taken from the abutting owners were established by acquiescence and prescription and could not be recovered after twenty years enjoyment by the railroad company, but still the easements of light and air, the taking of which we now complain, had not been disputed. Plaintiff's building was erected in 1882 and plaintiff and the other tenants of these handsome apartments actually possessed and enjoyed those easements for ten years thereafter until this act of 1892.

Therefore they are not only plaintiff's property by right of title but by prescriptive right; by the best of all possible rights that of long notorious and undisputed possession and enjoyment under color of title.

On the defendants by every fundamental rule of law and evidence rests the burden of establishing their right to keep what they seized and took from us by the high hand in 1894; they cannot sustain that burden by mere reference to a State statute; of other defense there is none in this record.

FOURTH POINT.

The New York Court of Appeals had no power to deprive these easements of their full value or character as property, and made no pretense of doing so by its decision herein.

In the *Muhlker* case, defendants' counsel argued that the effect of the decision of the Court of Appeals was that under the local property laws of New York, plaintiff had no easements of light and air in these premises in 1892 capable of being taken by the defendants, and that by that decision this Court was foreclosed from examining into the facts and from deciding that plaintiff's property rights had in fact been invaded by the proceedings under the statute of 1892. Such a construction of the Constitutional provisions referred to would practically amount to their nullification or would permit such nullification or evasion at the option of the State authorities. The provisions of the Federal Constitution are that the State shall not pass any law impairing the obligation of contracts and that private prop-

erty should not be taken for public use without just compensation, nor without due process of law. The remedy is not confined to cases where the State courts *admit* that the Constitution has been violated or deny its principles but extends to all cases where it has in fact been violated. Were it otherwise the Constitutional protection would be of little value.

If private property is in fact taken without process of law or without compensation the citizen is entitled to come to this Court for his remedy even though the State Court may say that which has been taken is not in fact property.

Thus this Court will construe a contract in order to ascertain for itself whether it has been impaired under State authority notwithstanding the State Court construction to the contrary.

McCullough v. Commonwealth of Virginia, 172 U. S., 102.
Columbia Water P. Co. v. Columbia St. R. Co., 172 U. S., 475.

In both these cases it was held that it was the duty of the Supreme Court to look into the record to ascertain what in point of fact was done in the State Courts and whether the Constitution had in fact been violated in the matters complained of.

Here, as a matter of fact, the New York Courts have never for a moment pretended that these easements did not constitute property. The doctrine that easements of light and air appurtenant to real estate in the City of New York and elsewhere do constitute property for the taking of which all appropriate remedies may be had was thoroughly established in the elevated railroad case of *Story v. E. R. Co.*, 90 N. Y., 122, followed

by *Lahr v. El. R. Co.*, 104 N. Y., 268, and by scores of reported and hundreds of unreported similar decisions in that State.

In the present case the trial Court found as a fact, that the plaintiff had owned during the period of her ownership as aforesaid, certain easements of light, air and access in Park avenue and appurtenant to her said premises (*decision, 1st paragraph, p. 16*), and that "the said permanent "structure and the operation of trains thereon "outside of the 24 foot strip are, and since Feb- "ruary 16, 1897, have been, a continuous trespass "upon plaintiff's easements of light and air ap- "purtenant to said premises (*Decision, paragraph 5th, p. 17*). The value of the easements taken was also determined upon substantial evidence and the plaintiff was held entitled to judgment. That judgment was affirmed by the Appellate Division, four judges concurring. This determined the question of fact in the New York Courts.

The Code of Civil Procedure of the State of New York provides as follows (Sec. 191, Sub. Div. 3):

> "The jurisdiction of the Court (of Appeals) is limited to a review of questions of law."

While the Court of Appeals in this case handed down no opinion, yet the Federal Supreme Court, when necessary, will probably take judicial notice of the opinions in the *Muhlker* and other cases. In the *Muhlker* case Chief Judge Parker said, in the prevailing opinion:

> "Although at the time of the decision of the Lewis case we accepted as sound the proposition that when defendant commenced to

> use the steel viaduct it started a new trespass upon the rights of the abutting owners, for which it could properly be held liable, subsequent reflection persuaded the majority of the Court that this was error" (173 N. Y., 553).

and again

> We still think, under the authority of Radcliff's Executors *vs.* Mayor, etc., of Brooklyn, 4, N. Y., 195, and the other cases cited by Judge Martin in his opinion in the Fries case, that the city had power to make its improvement as it did, *without compensation to the abutting owner.*"

Similarly, in the case of *Fries vs. N. Y. & H. R. R. Co., 169 N. Y., 270,* which was the first of these cases where the right of the plaintiff to recover was denied or questioned, it is said in the prevailing opinion, p. 276;

> "I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was but a consequence of the improvement *for which the railroad was not responsible.*"

In the case of *Kierns vs. N. Y. & H. R. R., 173 N. Y., 642,* it was simply stated that the judgment was reversed upon the authority of the Fries and Muhlker cases. In the subsequent cases including this Birrell case there was no opinion. It is clear, therefore, that the decision of the Court of Appeals was placed upon the broad ground that the trespasses and the taking of the property of the

abutting owners was justifiable, because done under the authority of the state law, and that that Court never attempted to deny the facts found by the New York Supreme Court of the value of the easements, or to modify those findings in any way. This is further shown, by reference to the dissenting opinions in the same Court. Three of the Judges, Bartlett, Vann and the present Chief Judge Cullen, wrote strong dissenting opinions, from the perusal of which it is evident that there was no doubt in the mind of any member of the Court that the property was actually there and had been confiscated.

Judge Vann said that he regretted the result "as amounting to the confiscation of property belonging to abutting owners, and the gift thereof to railroad corporations". *Kierns case, 173 N. Y., 643.*

Defendants' claim therefore that the constitutional question was not and is not decisive of these cases is untenable.

FIFTH POINT.

Creation of the Easements.

The proceedings for the opening of Fourth Avenue amounted to a contract with the abutting owners.

First, we have the Act of 1807 (*Laws 1807, Chap. 115; p. 275*) providing that the Commissioners' plans, surveys and maps made pursuant

to that Act should be final and conclusive in respect to both the city and the owners of lands within the boundaries of the streets "and in re-"spect to all other persons whomsoever", and this Act was declared to be a public act (*Laws 1807, p. 297*). Pursuant to that Act a map was filed by the said Commissioners, in 1811, which map officially established the streets and avenues of Harlem and represented Fourth Avenue as 100 feet wide (*Record p.* 48).

Following this is Chapter 86 of the Revised Laws of New York of 1813, which provides (*Vol. 2, p. 414*) that when lands in New York City are required for public purposes "the said mayor, "aldermen and commonalty of the City of New "York shall become and be seized in fee of all the "said lands * * * in trust, nevertheless, that "the same be appropriated and kept open for, or "as part of a public street, avenue, square or "place, forever, *in like manner as other public "squares and places in said city are and of right "ought to be.*"

The filing of this map representing the streets, as required by the statute of 1807, and followed by the provisions of the State law of 1813, above referred to, amounted to a dedication of these streets to public street uses forever and to a contract between the public and the abutting owners severally, that the strips of land represented on the map as streets should remain such perpetually, with all the incidents legally appertaining thereto and such has always been the law of the State of New York.

Story v. N. Y. El. R. Co., 90 N. Y., 122; see pp. 160, 172, 177.

Lahr v. Met. El. R. Co., 104 N. Y., 268; see p. 290.

Kane v. N. Y. El. R. Co., 125 N. Y., 164, 177.

These propositions are not seriously contradicted by the defendants. The complaint alleges that Park avenue was a public street opened and established as such, and that the title was held by the City of New York in trust for public use, with certain rights of easements therein set forth, including easements of light, air and access (*Complaint pars. 3 and 4*). There is only a qualified denial of this in the answer, that is to say, a sort of a negative pregnant,—a denial that the *whole* of the strip of land known as Park avenue is now or ever has been a public street and alleging that it was subject to the rights of the defendants to operate their railroad. In none of the State courts has defendant attempted up to the present time to deny the general proposition that the effect of the street opening proceedings in the City of New York was to create a trust as claimed above by the plaintiff herein.

Next, we have in point of time, the agreement of January 9th, 1832, between the N. Y. & Harlem Railroad Company and the City of New York, which embodied the ordinance of the common council on December 22, 1831, distinctly recognizing the existence of Fourth avenue, that it was absolutely subject to regulation and control of the City authorities and that the railroad was to be there by sufferance only. The street rights and easements thus created were recognized and continued without any interference whatever down to 1872, because the use of Fourth avenue for the purposes of a surface road was not inconsistent with street uses and therefore did not legally constitute an interference with said easements.

In 1872 there was a change in the structure of the railroad under legislative sanction whereby

the road was widened and there was a cut made in the street, and parapets were erected to guard the railroad tracks, constituting an interference with the easements of access but of comparatively slight interference with the easements of light and air and said easements of light and air remained undisturbed until 1893 or 1894 when they were appropriated by the defendants in the manner complained of in this case.

SIXTH POINT.

The erection of the Elevated Railroad on Fourth avenue was a perversion of the use of that avenue from its original purpose.

In the *Story* case (90 N. Y., 122, 156) the Court referring to the elevated structure on Pearl street, said: "There was no change in the street surface "intended; but the elevation of a structure use- "less for general street purposes, and as foreign "thereto as the house in Vesey street (*Corning v. "Lowerre,* 6 Johns, Ch. 439) or the freight depot "(*Barney v. Keokuk, supra*)."

In the *Lahr* case (104 N. Y., 268, 288) the Court said that such elevated railroad "is a perversion of the use of the street from the purposes originally designed for it."

So in the *Kane* case (125 N. Y., 164, 176) Judge Andrews in referring to the *Story* case, declared that that decision held and that an elevated railroad "was obstructive of the street uses for which "streets are established."

In the *Fobes* case (121 N. Y., 505) Judge Peckham said at p. 517 "Such a permanent, total, exclusive and absolute appropriation of a portion "of the street as this structure amounted to was "held to be illegal and wholly beyond any legitimate or lawful use of a public street" (referring to the *Story* case.)

Finally, in the *Muhlker* case, decided in this Court April 10, 1905, these decisions are approved and enforced, the Court saying that the *Story* and *Lahr* cases are in point and decisive (*Opinion, McKenna, J.*).

SEVENTH POINT.

The defendants were not under compulsory obligation to erect the viaduct structure complained of.

The learned counsel for the defendant, and a majority of the Judges of the Court of Appeals, were in error in supposing, as they seem to have supposed, that under Chap. 339 of the New York Laws of 1892, the defendants were actually compelled to erect the viaduct structure provided for by that act. The provisions thereof though in form a *command*, were in effect a *permission*.

In the construction of statutes it frequently happens that the word "may" means "shall"; that is to say, that words of permission are to be construed in a proper case as words of compulsion; and so in statutes like the present, granting a monopoly or advantage upon specified terms,

the directory or mandatory words used in stating the *terms* of the permission are to be construed together *with* the permission, and as stating merely the conditions thereof.

It was treated as a permission by the company from the beginning.

The payments for the structure were made half by the defendant Railroad Companies and half by the city, *from time to time* as the work progressed, so that in the construction of the road the defendant company took a voluntary part.

It is not to be assumed that there was an absolute necessity requiring the defendants' railroads to be operated in Fourth Avenue; there was no absolute necessity for the continuance of their depot at 42nd Street. Their terminal could have been removed to 135th Street, north of the Harlem River, with possible advantage to the people of the city. When the station at 42nd Street was originally established it was in the upper part of the residential quarter; as far uptown comparatively, as a station at 135th Street would now be. It was therefore a decided advantage to the Company to be allowed to construct this viaduct as a condition of continuing to occupy its station in Forty-second Street, and to operate its trains therefrom, instead of being required to go off Manhattan Island altogether, as it might and perhaps should have been at that time.

The statute amounted to an offer by the Legislature of New York, to be accepted by the Railroad Company or rejected as it saw fit. It probably required the Railroad Company to vacate the surface of the street which they had previously occupied, but there was no power in the Legislature to compel the Railroad Company to construct

a viaduct there, nor to compel it to accept and use the same when constructed. The only penalty which could have been inflicted upon the Railroad Company, in the case of its declining to accept the proposed scheme, would have been a refusal by the State to allow it longer to continue to occupy Fourth Avenue. It was occupying the street surface under a license from the Legislature and the City authorities, and the effect of the statute was to terminate that license, and to offer a new license for the use of the viaduct structure, upon the terms stated in the Act, including payment by the Railroad Company of half its cost.

That this Act of 1892 was drawn in the interest of the Railroad Company and probably by the Company's officials is evident from a mere reading of the details of the proposed work therein carefully and scientifically set forth. The facts also show that the servants of the road actually supervised the construction. Mr. Katte, a civil engineer in the employ of the Railroad Company, was one of the commissioners and superintending engineer of this work, and as such prepared the plan for the elevation of the tracks (*Record, p. 46*); Mr. Naylor, another civil engineer in the defendant's employ, was the employee of the Board for the Park Avenue Improvement (*Record, p. 44*), and there were probably others.

Upon the completion of this viaduct it was to be the property of the defendant companies, although they had paid but half of its price, and they were clothed with a monopoly of the use thereof, to the exclusion of all other railroads and persons whatsoever.

"Said improved structure and bridge shall be "*exclusively for the uses and purposes of the* "*Railroad Company* (Sec. 24). "No trains of

"other companies, without such permission (of the defendants) shall be run thereon." (Sec. 26).

The command of the Act of 1892 to the defendants was *first* to vacate the surface of Fourth avenue. That command was probably within the power of the Legislature, but whether it was so or not does not concern the plaintiff. The *next* command or permission was to contribute one-half of the price of the proposed viaduct structure in Fourth avenue which was to be used for the sole benefit of the defendants. In that scheme defendants could not be compelled to join. No doubt it was well understood in advance that the scheme was of their contriving or was known to be acceptable to them. By contributing to the construction and accepting the benefits of the plan, and by appropriating the plaintiff's easements in the operation of said scheme, the defendants adopted the responsibility thereof and ought not to be heard to disclaim it.

As was stated by *Judge Cullen* in his dissenting opinion in the *Fries* case "The situation in no "way differs from that which would have been "presented had the Legislature turned the Rail-"road Company off the street altogether, and "made it construct a new line on adjoining prop-"erty. In either case the Railroad would be "bound to pay for what it took."

To put it in another way: If the command of the statute was in substance to defendants to appropriate plaintiff's easements without compensation, then it was illegal and immoral, and they were not bound to obey it. If, on the contrary, the command was, as *Judge Cullen* intimates, upon the theory that they were to pay for the property they took in executing it, then there can be no defense to this action.

EIGHTH POINT.

The Courts, particularly in New York State, are a unit in holding that an elevated railroad cannot be erected and operated by a private corporation on public streets, without compensation to abutting owners.

It is unnecessary to argue this point at length as it will have to be conceded by the defense. A few extracts, however, from a multitude of decisions, mostly in New York courts, will tend to illustrate how this doctrine has been emphasized and enforced:

In the *Story* case, speaking of the power of the Legislature to authorize an elevated railroad structure in a street, Danforth, J., said (90 N. Y., 122, 160):

> "*This cannot be done even by the Legisla-*
> "*ture without compensation to the abutting*
> "*owner.* It would be a perversion of law and
> "reason to construe a trust to keep open land
> "for street purposes as subject to such regu-
> "lations as would destroy the street, or en-
> "able the Legislature or municipality to
> "grant away an exclusive right to any part
> "of it."

On the same subject Tracy, J., declared that the Legislature by virtue of its power to regulate and control the public uses of a street could not divert them to the construction and maintenance of an elevated railroad. He said (90 N. Y., 169):

"This is *a question of power.* If the Leg-
"islature has the power to authorize such a
"structure, without compensation, its exer-
"cise cannot be regulated by the Courts. If
"one road may be authorized to be construct-
"ed upon two series of iron columns placed
"in the street, another may be authorized to
"be supported upon brick columns or upon
"brick arches spanning the street. If a su-
"perstructure may be authorized which spans
"the entire carriageway at fifteen feet above
"the bed of the street, one may be authorized
"which spans the entire street from building
"to building, thus excluding light and air
"from the street and from the property abut-
"ting thereon."

He further says (p. 171):

"The defendant's railroad as authorized
"by the Legislature, directly encroaches upon
"the plaintiff's easement and appropriates
"his property to the uses and purposes of a
"corporation. This constitutes the taking of
"property for public use. It follows that
"such a taking *cannot be authorized*, except
"upon the condition that the defendant makes
"compensation to the plaintiff for the prop-
"erty thus taken."

He also quoted from the opinion of the Supreme Court of the United States in *Railroad Company* v. *Schurmeir* (7 Wall., 272), where that Court says:

"Attempt is also made to justify the acts
"of the respondents (the railroad company)
"as grantees of the State, upon the ground
"that the complainant, in dedicating the
"premises to the public as a street, levee and
"landing, parted with all his title to the same,
"and that the entire title vested in fee in the

"State. Respondents rely for that purpose "upon the statute of the Territory of Minne- "sota. Suppose the construction of that pro- "vision assumed by the respondents, is cor- "rect, it is no defense to the suit, because it is, "nevertheless, true that the municipal cor- "poration took the title in trust, impliedly, if "not expressly, designated by the act of the "party in making the dedication. *They could "not, nor could the State,* convey to the re- "spondents any right to disregard the trust, "or to appropriate the premises to any pur- "pose which would render valueless the ad- "joining real estate of the complainant."

Tracy, J., further added, with reference to the power of the Legislature (90 N. Y., 177):

"The obligation to preserve it as an open "street rests in contract written in the statute "under which the lands were taken, and "which may not be violated by the exercise "of any legislative discretion."

In *Mahady v. The Bushwick Railroad Co.,* 91 N. Y., 148, 153, Andrews, C. J., said with reference to the effect of the *Story* case:

"The plaintiff, though an abutting owner "simply, the fee of the street being in the "city, was entitled to the use of the street, "and neither the Legislature nor the city "could devote it to purposes inconsistent "with street uses, without compensation, ac- "cording to the principle of Story *v.* The "Elevated Railroad Co., 90 N. Y., 122."

In the *Lahr* case (104 N. Y., 268, 288) Ruger, J., declared that the appropriation of a public street for an elevated railroad "is a use which neither the city authorities nor the Legislature

can legalize or sanction without providing compensation for the injury inflicted upon the property of abutting owners."

As to the power of the Legislature over city streets and their regulation for street use, RUGER, C. J., decided in the *Lahr* case, 104 N. Y., 268, 292:

> "The logical effect of the decision in the "*Story* case is to so construe the Constitution "as to operate as a restriction upon the legis- "lative power over the public streets open- "ed under the Act of 1813, and confine its "exercise to such legislation as shall author- "ize their use for street purposes alone. "Whenever any other use is attempted to be "authorized, it exceeds its constitutional "authority. Statutes relating to public "streets which attempt to authorize their "use for additional street uses, are obviously "within the power of the legislature to enact, "but questions arising under such legislation "are inapplicable to the questions here in- "volved."

With reference to the legislative power to authorize the construction of an elevated railroad in the city street, Ruger, C. J., further declared in the *Lahr case,* 104 N. Y., 268-295:

> "The Legislature, as we have seen, had not "power to authorize the street to be used for "an elevated steam railroad, and that want "of authority extends to every incident nec- "essary to make the road an operative ele- "vated steam railroad, which occasions in- "jury to the rights of abutters on the "street."

In the *Kane* case, speaking of the power of the

Legislature over the city streets, and of the limitation upon that power, Andrews, C. J., said (125 N. Y., 183):

> "We have, then, an express and deliber-
> "ate legislative declaration of a trust in re-
> "spect to all the streets owned by the city,
> "however or whenever acquired, that they
> "shall forever be kept open as public streets,
> "upon faith of which owners of abutting
> "property have, or are presumed to have,
> "acted in improving and building thereon.
> "Can the Legislature abrogate this trust, or
> "authorize its violation without making
> "compensation for any injury sustained by
> "abutting owners? Justice requires a nega-
> "tive answer, and we think it may be proper-
> "ly said that the acceptance and acting upon
> "this trust by owners of abutting property
> "creates in them a right which the law will
> "enforce to have and enjoy the advantages
> "and incidents of a public street, in connec-
> "tion with their property, of which the Leg-
> "islature cannot deprive them without com-
> "pensation."

In the *Fobes* case, 121 N. Y., 505, 518, Peckham, J., referring to the facts, declares in the *Story* case as saying:

> "A plain, palpable and permanent misap-
> "propriation of the street or some portion of
> "it to the exclusive use of the defendant cor-
> "poration, and as resulting from it, the
> "Court held that there was a taking of prop-
> "erty belonging to the plaintiff without com-
> "pensation, which no Legislature could au-
> "thorize or legalize."

In the *Reining* case (128 N. Y., 157, 167), Andrews, J., declared that:

> "The Legislature cannot legally authorize

"structures for railroad purposes to be "erected therein for the use and convenience "of railroads, which practically exclude the "abutting owners from the part of the street "so occupied without compensating them for "the injury suffered."

In Abendroth v. *Manhattan Ry. Co.* (122 N. Y., 1) the Court said:

"An owner of a lot adjoining a city street, "although his title extends only to the side "of the street, and he has no ownership of "the land or interest therein, save as abut- "ting owner, has incorporeal private rights "therein, which are incident to his property, "and which may be so impaired as to entitle "him to damages. Such rights are private "property within the provisions of the State "Constitution (Art. 1, § 6) which forbid the "taking of private property for public use, "without just compensation."

In *Kane* v. *N. Y. Elevated R. R. Co.* (125 N. Y., 165), the Court said:

"The owners of lots abutting on a city "street, the fee of which is in the municipal- "ity, have, by virtue of proximity, special "and peculiar rights, facilities and privi- "leges therein in the nature of easements, "which are not common to the citizens, and "constitute property of which they cannot be "deprived by the Legislature or the munici- "pality, or both, without compensation; and "any use of such street inconsistent with its "use as a public street which interferes with "these easements, is a taking of property, "for which said owners are entitled to com- "pensation to the extent of the damages oc- "casioned thereby."

In *Egerer* v. *N. Y. C. & H. R. R. Co.* (130 N. Y.,

115), the above decisions were approved and applied to a case where under an Act of the Legislature a street in Rochester had been partially closed for the purpose of elevating railroad tracks and the railroad company previous to the time of discontinuing the street had acquired the fee of the same for railroad purposes subject to its use by the general public.

NINTH POINT.

The only pretended justification for the appropriation of plaintiff's easements is the New York Act of 1892.

We are thus brought to the conclusion as stated in the above heading, that the only possible pretense of justification for the taking of the plaintiff's easements, is to be found in the Act of 1892. We have seen how these easements were created; we have seen that they existed and had been enjoyed by her and her predecessors in title for over half a century prior to 1893; and we have seen that a private corporation could not have appropriated them without compensation. The defendants, however, claim that they were justified in this appropriation by Chapter 339 of the Laws of 1892, which they set up in their answer. There is nothing else left of the defense. The condemnation proceedings against the infant Benson, by which defendants acquired the twenty-four foot strip are of no consequence in the case as presented, be-

cause they were allowed by the decision of the trial Court the use of this strip to the fullest extent claimed by them. Neither can they plead the *erection* of the viaduct by the State as a partial defense because there has been no recovery in this case for that erection, nor even for the operation of it, as long as the State assumed any control whatever, namely, for the three years during which the erection was progressing from 1894 to 1897. For the trespasses which the defendants are daily committing upon plaintiff's property their only shield is the State Statute of 1892.

TENTH POINT.

The authority exercised by the Court of Appeals under Chapter 339 of the New York Laws of 1892 to deprive plaintiff of her property without compensation, was repugnant to the Constitution of the United States.

It is not necessary in this case for this Court to decide the question whether the Act of 1892 was or was not unconstitutional. That Act nowhere states that the railroad companies shall be free from the obligation of paying for the easements they have appropriated, and this is pointed out in the Fries case by the able dissenting opinion of Judge Cullen. This writ of error is granted under the Act of Congress which provides for a review, where either the statute *or the authority* exercised thereunder is repugnant to the Constitu-

tion of the United States. And the record in the Court of Appeals shows that that was the question raised before it, for it reads: "That in the said "suit or action there was drawn in question the "validity of Chapter 339 of the laws of 1892 and "the acts amendatory thereof *and of the authority "exercised thereunder* on the ground of their be- "ing repugnant to the Constitution of the United "States."

The statute provided for the erection of an elevated railroad. The Supreme Court of the State of New York held that plaintiff was entitled to compensation for the property taken in the construction of the road. The Court of Appeals held otherwise, and that because the State had commanded the erection, plaintiff was not entitled to such compensation. It is this *decision of the Court of Appeals* that we seek to have reversed. It is that *authority exercised under that Act* that we seek to have overruled in this case.

This authority was exercised in a manner violative or repugnant to the Constitution, because it took plaintiff's property without the opportunity for a hearing or any pretense of such an opportunity.

Notice of hearing or an opportunity to be heard are necessary elements of due process of law.

Roller v. Holly, 176 U. S., 398, 409.
Carson v. Brockton Sewerage S., 182 U. S., 398, 401.

Due process of law also included provision for compensation for property taken.

Chicago, Etc., R. Co. v. Chicago, 166 U. S., 226, 236, 241.

Tindal v. Wesley, 167 U. S., 204, 222, 223.

Holden v. Hardy, 169 U. S., 366, 390-1.

Norwood v. Baker, 172 U. S., 269, 277.

Further, it is to be said that the prohibition in the Fourteenth Amendment applies to all instrumentalities of the State, its legislative, executive and judicial authorities.

Chicago, Etc., R. C. v. Chicago, 166 U. S., 226, 233, 234.

Scott v. McNeal, 154 U. S., 34, 35.

The legislature has no power to abrogate the trust created by the dedication of land for public purposes except upon making compensation.

Railroad Co. v. Schurmeir, 7 Wall (U. S.), 272, 289, 290.

U. S. v. Ill. Central R. Co., 2 Biss. (U. S.), 174, 181.

Packet Co. v. Sorrels, 50 Ark., 466, 473.

Canastota Knife Co. v. Newington Tramway Co., 69 Conn., 146, 172.

City of Jacksonville v. Jacksonville R. Co., 67 Ill., 540, 543.

City of Chicago v. Ward, 169 Ill., 392, 412.

Warren v. The Mayor, 22 Iowa, 351, 356.

Franklin Co. v. Lathrop, 9 Kan., 453, 463.

Schurmeir v. St. Paul R. Co., 10 Minn., 82, 105. Affd. 7 Wall (U. S.), 272.

City of St. Paul v. Chicago R. Co., 63 Minn., 330, 352.

Belcher Sugar Ref. Co. v. St. Louis Co., 82 Mo., 121, 125-6.

Cummings v. St. Louis, 90 Mo., 259, 263-4.

City v. Laverack, 34 N. J. L., 201.

Trustees v. Mayor, 19 N. J. Eq., 355, 357.

Methodist Episcopal Church v. Penn. R. Co., 48 N. J. Eq., 452.

LeClercq v. Gallipolis, 7 Ohio, 217.

Board of Education v. Edson, 18 Ohio St., 221, 225.

Portland R. Co. v. City of Portland, 14 Oregon, 188, 197.

Lamar Co. v. Clements, 49 Texas, 348.

Penn. v. Wheeling Bridge Co., 13 How. (U. S.), 518.

Bridge Proprietors v. Hoboken Co., 1 Wall (U. S.), 116, 144-5.

The Binghamton Bridge, 3 Wall (U. S.), 51.

Finally, the proposition at the head of this point has been finally and conclusively decided as there stated by this Court in the Muhlker case (April 10, 1905).

ELEVENTH POINT.

The constitutional provisions for the protection of property and contracts should be liberally and faithfully enforced.

This is a flagrant instance of a violation of property and contract rights. The defendants, under pretended color of authority by the legislature, entered on a public street and appropriated and destroyed valuable property belonging to scores of private individuals, bringing them in many cases to the verge of ruin. The facts were notorious, and were, moreover, proven convincingly in the Courts and before judges having full knowledge of the local situation. A dozen different Supreme Court Justices of the highest character and familiar with the locality, found the facts as the property owners claimed, and gave solemn judgment that they had actually suffered the grievances they complained of, and were entitled to redress in damages. The State Court of Appeals, following a line of unbroken decisions, affirmed the principle and the judgment in the first case before it. And then, at last, the same Court of Appeals, by a bare majority vote, reversing itself, tells the injured property owners and contract owners, that they have no right to demand any redress or compensation whatever; that the State law has abrogated the contract on which they relied, and has decreed that property which they and their predecessors have possessed for half a century shall be taken from them without compensation. Now when they come here, they are told by the defendants' learned

counsel that as the State Court must be supposed to have decided justly, therefore the presumption is conclusive that these plaintiffs never had any property or contract rights of which they could be deprived. In the State Courts plaintiffs are told, yes, the defendants have taken your property, but they did it by command of the State, and you have no redress; and when they appeal to this Court and ask if that is really the law, then they are told by the same defendants at this Bar that they never had any easements and were never deprived of any, and when, in reply, they turn to the record and the findings of the Court, showing that they actually had this property, and that they lost it, and what damages they have sustained, and what the evidence shows, and what the State Courts themselves found and decided to be the fact, they are answered that this Court must not examine the findings, but must assume that the New York Court of Appeals did exactly the contrary of what it actually did, and what it said it did, and what it openly claimed it did when it decided these cases. Justice would indeed be blind if such a plea could be successful.

If whenever the action of the State authorities is brought here for review upon a claim that they have taken property without compensation, it is to be a sufficient answer that there is a conclusive presumption of law that the State authorities did right, and that there was in fact no property to be paid for notwithstanding the facts and notwithstanding the findings of the State Courts themselves, then the right of review in such cases and the constitutional safeguard are practically valueless.

The true rule requires and plain justice re-

quires this court to look into the record and see what the facts are as found by the court below and as they appear uncontradicted upon the record and acting upon those facts, to give contracts and property rights the protection which the Constitution guarantees.

In *Murray* v. *Charleston*, 96 U. S., 432, 448, it was said: "There is no more important provision "in the federal constitution than the one which "prohibits States from passing laws impairing "the obligation of contracts, and it is one of the "highest duties of this Court to take care that "the prohibition shall neither be evaded nor frit-"tered away. Complete effect must be given to it "in all its spirit. The inviolability of contracts, "and the duty of performing them as made, are "foundations of all well ordered society and to "prevent the removal or disturbance of these "foundations, are one of the great objects for "which the Constitution was framed."

TWELFTH POINT.

The judgment entered upon the decision of the New York Court of Appeals should be reversed.

ALFRED B. CRUIKSHANK,
Of Counsel for plaintiff in error.

FILED
APR 25 1
JAMES H. McKENN

IN THE

Supreme Court of the United States.

ALICE I. BIRRELL, *Plaintiff in Error,* *against* THE NEW YORK & HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, *Defendants in Error.*	October Term, 1904. No. 202.
PATRICK KIERNS, *Plaintiff in Error,* *against* THE NEW YORK & HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, *Defendants in Error.*	October Term, 1904. No. 203.

STATUTES AND DECISIONS SUPPLEMENTAL TO BRIEF OF PLAINTIFFS IN ERROR.

ALFRED B. CRUIKSHANK,
of Counsel for Plaintiffs in Error

ATWATER & CRUIKSHANK,
Attorneys for Plaintiffs in Error.

LIVINGSTON MIDDLEDITCH CO., 68 DUANE ST., N. Y.

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The Act of 1807 under which the City streets were laid out.

Laws of 1807, of State of New York.

Material Parts of Chapter 115.

AN ACT relative to improvements, touching the laying out of streets and roads in the City of New York, and for other purposes:

Be it enacted by the people of the State of New York, represented in senate and assembly, that Gouverneur Morris, Simeon DeWitt and John Rutherford be, and they are hereby appointed Commissioners of Streets and Roads in the City of New York, for the purpose of performing the several acts and duties hereinafter prescribed.

And be it further enacted, that it shall and may be lawful to and for the said commissioners, or any two of them, and they shall have and possess exclusive power to lay out streets, roads and public squares of such width, extent and direction as to them shall seem most conducive to public good, and to shut up or direct to be shut up any streets or parts thereof which have been heretofore laid out, and not accepted by the common council of the said city, within that part of the said city of New York to the northward of a line commencing at the wharf of George Clinton, on Hudson river; thence running through Fitzroy road, Greenwich lane and Art street, to the Bowery road; thence down the Bowery road to North street; thence through North street, in its present direction, to the East River; and no square or plot of ground, made by the intersection of any streets to be laid out by the said commissioners shall ever after the streets around the same shall be opened, be or remain divided by any public or open lane, alley, street or thoroughfare; and it shall be the duty of the said commissioners to lay out the leading streets and great avenues, by them to be laid

out, of a width not less than sixty feet, and in general to lay out said streets, roads and public squares of such ample width as they may deem sufficient to secure a free and abundant circulation of air among said streets and public squares when the same shall be built upon; and said commissioners shall not, in any case, lay out any streets of less than fifty feet in width.

And be it further enacted, That it shall and may be lawful to and for the said commissioners, and for all persons acting under their authority, to enter, in the daytime, into and upon any lands, tenements or hereditaments which they shall deem necessary to be surveyed, used or converted for the laying out, opening and forming of any street or road as aforesaid; and that the said commissioners, or any two of them, shall cause three similar maps of such streets and roads, so to be laid out by them as aforesaid, and of the shores bounding the land by them surveyed, to be made upon an extensive scale, accompanied with such field notes and elucidatory remarks as the nature of the subject may require; which maps, accompanied by such field notes and remarks, shall be attested to by the said commissioners, or any two of them, before any person authorized to take acknowledgments of deeds and conveyances, and be filed one in the office of the secretary of state, to remain of record, one other to be filed in the office of the clerk of the city and county of New York, to remain of record, and the other of said maps to belong to the mayor, aldermen and commonalty of the city of New York; and that the said commissioners shall erect suitable and durable monuments at the most conspicuous angles or those which shall be the most eligible for that purpose, and upon the shores of the North and East rivers, to be noted on said maps and that the said commissioners shall take the elevations of the several intersections or squares above high-water mark within the boundaries aforesaid, or so many of them as they may think sufficient, and shall delineate them, together with all such hills, vallies, inlets and streams as may be necessary on the said maps, so as to render the same explicit and intelligible. * * *

And be it further enacted, That the plans and surveys of the said commissioners, or any two of them in respect to the laying out of streets, and roads, within the boundaries aforesaid, and the maps of the same, so as to be made by them or any two of them, as aforesaid, shall be final and conclusive, as well in respect to the said mayor, aldermen and commonalty as in respect to the owners and occupants of lands, tenements and hereditaments within the boundaries aforesaid, and in respect to all other persons whomsoever.

Then follows a provision for agreement as to price, and in default thereof, of appraisement by commissioners in the ordinary form and assessments upon the property benefited.

And upon such assessment being completed, said mayor, aldermen and commonalty of the city of New York shall be and become seized in fee of all such lands, tenements and hereditaments, and thereupon the said mayor, aldermen and commonalty of the city of New York, or any person acting under their authority, may immediately take possession of the same without any suit or proceeding at law for that purpose, *in trust nevertheless, that the same be kept open for a public street, road, or public square forever.*

And be it further enacted that this Act shall be considered adjudged and taken to be a public act and be liberally expounded and construed to advance the ends thereof.

Act of 1813 providing for street openings.

Material Parts of Chapter LXXVI of the Revised Laws of the State of New York.

AN ACT to reduce several laws relating particularly to the City of New York into one act, passed April 9, 1813.

CLXXVII. Opening and laying out streets, &c.

And be it further enacted that whenever and as often as the mayor, aldermen and commonalty of the City of New York shall be desirous to open any street, avenue, square, or public place, or any particular part or section of any street or avenue laid out by the commissioners of streets and roads in the City of New York, under and by virtue of the act, entitled "An act relative to improvements touching the laying out of streets and roads in the City of New York, and for other purposes," passed April 3, 1807, and also whenever and as often as so many proprietors of lands fronting on any such street, avenue, square or public place, or any particular part or section of any such street, avenue, square or public place as shall together own three-fourths parts of all the lands fronting on such street, avenue, square or public place, or on such part or section of any such street, avenue, square or public place, shall by petition, desire the said mayor, aldermen and commonalty to open any such street, avenue, square or public place, or any such particular part or section of any such street, avenue, square or public place, and the said mayor, aldermen and commonalty shall deem the opening thereof to be necessary or useful, it shall be lawful for the said mayor, aldermen and commonalty to cause the same to be opened, and the lands, tenements and hereditaments that may be required for the purpose of opening the same, may be taken for that purpose, and compensation and recompence made to the parties and persons, if any such there

shall be to whom the loss and damage thereby shall be deemed to exceed the benefit and advantage thereof, for the excess of the damage over and above the value of the said benefit, in the manner hereinafter for that purpose directed and prescribed; and whenever and as often also as it shall in the opinion of the said mayor, aldermen and commonalty, in common council convened, be necessary or desirable for the public convenience or health to lay out, form and open any street, or streets, or public place or places, in any part of said city, not laid out into streets, avenues, squares and public places by the commissioners of streets and roads in the City of New York, under and by virtue of the act aforesaid, or to extend, enlarge, straighten, alter or otherwise improve any street or streets or part of a street, or public place or places, already laid out or hereafter to be laid out, and formed or opened in any part of said city not laid out into streets, avenues, squares and public places by the commissioners aforesaid, it shall be lawful for the said mayor, aldermen and commonalty of the City of New York, to order and direct the same to be done, and to cause the same to be done accordingly in such manner as they shall think most advisable, notwithstanding it may become necessary for that purpose to remove any building or buildings, or to take any lands, tenements, hereditaments or premises whatsoever; and if the said mayor, aldermen and commonalty shall require any lands, tenements, hereditaments or premises of any person or persons, or body politic or corporate, for any such purpose the same may be taken and appropriated to such use, and compensation and recompense made to the parties and persons respectively, if any such there shall be, to whom the loss and damage thereby shall be deemed to exceed the benefit and advantage thereof, for the excess of the said damage above the said benefit, in the manner for that purpose hereinafter mentioned and provided.

CLXXVIII: Be it further enacted, that whenever and as often as any lands, tenements, hereditaments or premises whatsoever shall be required for the said purposes of

opening any such public square, place, street or avenue, etc.

Here follows detailed provisions for the appointment of commissioners to ascertain the damages; their duties and manner of ascertainment, report to the Supreme Court of all proceedings and confirmation thereof.

Said report so confirmed to be final and conclusive upon all the parties and upon all other persons whomsoever, and on such final confirmation of such report by the said court, the said mayor, aldermen and commonalty of the City of New York, shall become and be seized in fee of all the said lands, tenements, hereditaments and premises in the said report mentioned, that shall or may be so required for the purpose of opening the said public square or place, street or avenue, or part or section of a street or avenue so to be opened, or for the purpose of laying out and forming the said street or public place so to be laid out and formed, or for the purpose of extending, enlarging or otherwise improving the street or public place so to be extended, enlarged or otherwise improved, as the case may be, the same to be appropriated, converted and used to and for such said purpose accordingly; and thereupon the said mayor, aldermen and commonalty, or any person or persons acting under their authority, may immediately, or at any time or times thereafter, take possession of the same, or any part or parts thereof, without any suit or proceedings at law for that purpose: *In trust, nevertheless, that the same be appropriated and kept open for, or as part of a public street, avenue, square or place forever, in like manner as the other public streets, avenues, squares and places in the said city, are, and of right ought to be.*

Sec. CLXXV provides that *all moneys expended by the corporation for said purposes shall be assessed upon the persons benefited* by the said public square or place, street or avenue or part thereof.

Charter of the N. Y. & Harlem R. R. Co.

CHAP. 263, LAWS 1831.

AN ACT to incorporate the New York and Harlaem Rail-Road Company. Passed April 25, 1831.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

Sec. 1. Benjamin Bailey, Mordicai M. Noah, Benson McGown, James B. Murray, Charles Henry Hall, Moses Henriques, Isaac Adriance, Thomas Addis Emmet, Gideon Lee, Silas E. Burrows, Samuel F. Halsey, Cornelius Harsen and Robert Stewart, with such other persons as shall associate with them for that purpose, are constituted a body politic and corporate, by the name of the New-York and Harlaem Rail-Road Company, with power to construct a single or double rail-road or way, from any point on the north bounds of Twenty-third street, to any point on the Harlaem river, between the east bounds of the Third avenue and the west bounds of the Eighth avenue, with a branch to the Hudson river, between One hundred and twenty-fourth street and the north bounds of One hundred and twenty-ninth street, to transport, take and carry property and persons upon the same, *by the power and force of steam, of animals, or of any mechanical or other power, or of any combination of them which the said company may choose to employ;* and by that name, they and their successors shall be and they are hereby vested with the right and privilege of constructing, erecting, building, making and using a single or double rail-road or way *for the purpose aforesaid, and for the term of thirty years from the passage of this act.*

Sec. 2 If the corporation hereby created shall not within six months from the passage of this act locate the route of said rail-road or way and the branch to the same, and make a survey of such location, and file a map thereof in the register's office of the city and county

of New York, and within two years from the passage of this act commence, and within four years from the passage of this act construct, finish, and put in operation the said single or double rail-road or ways, then the said corporation shall thenceforth forever cease, and this act shall be null and void; *but no such map shall be filed until the same shall have been submitted to and approved by the common council of the city of New York;* such approbation shall be expressed by a joint resolution of the said common council, declaring their approbation of the map, and of the route of the said rail-road indicated therein.

SEC. 3. The capital stock of the said company shall be three hundred and fifty thousand dollars, and the stock shall be divided into shares of fifty dollars each, and shall be deemed personal property, transferrable in such manner as the by-laws of said corporation shall direct.

SEC. 4. Isaac Adriance, Mordecai M. Noah, Benjamin Bailey, Moses Henriques, Thomas Addis Emmet, Benson McGown, Silas E. Burrows, Samuel F. Halsey, Cornelius Harsen, and Robert Stuart, shall be commissioners, the duty of whom it shall be on or before the first Monday of June next after the passing of this act at some suitable place in the city of New-York, to open books to receive subscriptions to the capital stock of the said corporation, and twenty days' public notice shall be given by the said commissioners of the time and place of opening such books, in one of the public newspapers of the said city; and said books shall be kept open for three days from ten to two o'clock of each day, and within ten days after said stock shall be subscribed, to give a like notice for a meeting of the stockholders, at such time and place as the said commissioners shall appoint, to choose thirteen directors, and such election shall be then and there made by such of the stokholders as shall attend for that purpose, either in person or by proxy, each share of the capital stock entitling the stockholder to one vote; and the said commissioners shall be inspectors of the first election of directors of the said corporation, and shall certify, under their hands, the names of those duly

elected, and deliver over the subscription books to the said board of directors; and the time and place of holding the first meeting of the first directors shall be fixed by the said commissioners, and the said board of directors shall have power to appoint an engineer, and cause such examinations and surveys for the said rail-road to be made as may be necessary to the selection by them of the most advantageous line, course or way for the said way; and the said board of directors shall, after such examinations and surveys shall be made, select and under their hands and seals, designate the line, course or way, which they may deem most advantageous for the said rail-road, one of which certificates shall be filed in the office of the register of the city and county of New-York; which line, course or way, so selected and certified, shall be deemed the line, course or way on which the said corporation shall construct, erect, build or make their single or double rail-road or ways as hereinafter mentioned; the expenses of all which surveys and examinations, and all manner of incidental expenses relating thereto, shall be paid for by the said corporation.

Sec. 5. The commissioners shall proceed to distribute the capital stock of the said corporation among the subscribers thereto; and in case there should be subscriptions to more than the amount of such stock, within the time above prescribed, it shall be the duty of said commissioners to apportion the same among the subscribers thereto, in such manner as they shall deem most advantageous to the interests of the institution; but no person who shall have subscribed for twenty shares or upwards, shall, upon such distribution, receive less than twenty shares, unless the subscriptions for the said last mentioned or a less number of shares, shall exceed the whole amount of the capital stock; nor shall there be allowed to any one of the commissioners or subscribers, directly or indirectly, or to any one in trust, for him, more than two hundred shares of said stock, if, without such allowance, the whole of the stock be taken up; and if, at the expiration of the third day on which the subscription books shall have been kept open, the whole

amount of the capital stock shall not have been subscribed, then the commissioners may subscribe for the remaining shares.

SEC. 6. The said board of directors to be chosen at such meeting, or at such annual election, shall, as soon as may be after every election, choose out of their own number one president, and one other person to be vice-president; and in case of the death, resignation or absence of the president, the vice-president shall preside until the annual election thereafter, or until he shall return, or another president shall be chosen; and in case of the death or resignation of the president or vice-president, or of any director, such vacancy or vacancies may be filled for the remainder of the year, wherein they may happen, by the board of directors; and in case of the absence of the president and vice-president, the board of directors shall have power to appoint a president *pro tempore*, who shall have and exercise such powers and functions as the by-laws of the said corporation may provide.

SEC. 7. In case it should at any time happen that an election of directors shall not be made on any day when pursuant to this act it ought to have been made, the said corporation shall not for that cause be deemed to be dissolved, but such election may be held at any other time directed by the by-laws of the said corporation, within sixty days after the day on which it should have been held.

SEC. 8. The said corporation are hereby authorized, by their agents, surveyor, and engineers, to enter upon such route, place or places, to be designated as aforesaid by the said directors, as the line, course, road and way whereon to construct their single or double rail-road or ways; and it shall be lawful for the said corporation to enter upon and take possession of and use all such lands and real estate as may be indispensable for the construction and maintenance of their single or double rail-road or ways, and may also receive, hold and take all such voluntary grants and donations of land and real estate as shall be made to the said corporation, to aid in the construction,

maintenance and accommodation of the said single or double rail-road, or ways, provided that all lands or real estate thus entered and taken possession of and used by the said corporation, and which are not donations, shall be purchased by the said corporation, of the owner or owners of the same, at a price to be mutually agreed upon between them; and in case of a disagreement of price, and before the making of any portion of the road upon said land, the said corporation or the owner of such land may apply by petition to the vice-chancellor of the first circuit, who upon such application shall cause such notice to be given to the other party as he shall deem proper and sufficient, appointing therein the time and place of hearing the parties, at which time and place, upon proof that the notice directed has been given, the said vice-chancellor shall direct the manner of ascertaining the damages which the owner of such land or real estate will sustain by the occupation thereof by the said corporation; and the said vice-chancellor shall appoint three competent and disinterested commissioners, who shall be freeholders and residents of the city of New-York, and who shall, under the direction of the said vice-chancellor, make appraisements and determine said damages and report in writing under their hands to the said vice-chancellor, who shall examine the same and hear the parties in relation thereto if he shall deem it expedient, and increase or diminish the damages if he shall be satisfied injustice has been done. The report shall contain a minute and accurate description of the land appraised. The commissioners shall be allowed three dollars each a day for their services. Upon proof to the said vice-chancellor, to be made within thirty days after his determination of payment to the owner or of the depositing to the credit of the owner in such incorporated moneyed institution, as the said vice-chancellor shall direct, of the amount of said damages and the payment of all expenses, the said vice-chancellor shall make an order or decree, particularly describing the land and reciting the appraisement of damages and the mode of making it, and all other facts necessary to a compliance with this section of this act;

and when the said order or decree shall be recorded in the office of the register of the city and county of New-York, the said corporation shall be seized and possessed of the fee simple of all such lands or real estate, and may enter upon, take and use the same for the purposes of the said road.

SEC. 9. In case any married woman, infant, idiot or insane person or non-resident of the state, who shall not appear after such notice, shall be interested in any such land or real estate, the said vice-chancellor shall appoint some competent disinterested person to appear before the said commissioners and act for and in behalf of such married woman, infant, idiot, insane person or non-resident.

SEC. 10. The said corporation is hereby authorized to construct, erect, build, make and use a single or double rail-road or ways of suitable width and dimensions, to be determined by the said corporation, on the line, course and way, selected or designated by them in manner aforesaid, and shall have power to regulate the time and manner in which goods and passengers shall be transported, taken and carried on the same, and shall have power to erect and maintain toll-houses and such other buildings for the accommodation of their concerns, as they may deem suitable to their interests: The said corporation shall not take any lands without the consent of the owner or owners thereof, exceeding forty feet in width from east to west, and shall in case of their locating the route of the said rail-road *in or along* any public street or avenue now laid out on the map or plan of the city of New-York, leave sufficient space in the said street or avenue on each side of the said rail-road for a public highway for carriages, and for a sidewalk for foot passengers.

SEC. 11. Whenever it shall be necessary for the construction of their single or double rail-road or way, to intersect or cross any stream of water or water courses, or any road, street or highway, it shall be lawful for the said corporation, with the consent and approbation of the mayor, aldermen and commonalty of the city of New-York, to construct their single or double rail-road or ways

across or upon the same; provided that the corporation shall restore the stream or water course or road, street or highway thus intersected, to its former state, or in a sufficient manner not to have impaired its usefulness, and shall, moreover, erect and maintain sufficient fences upon the line of the route of their single or double rail-road or ways.

SEC. 12. It shall be lawful for the company hereby incorporated, from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation of property or persons on the single or double rail-road or ways aforesaid, hereby authorized to be constructed, erected, built, made and used.

SEC. 13. If any person or persons shall wilfully do or cause to be done any act or acts whatever, whereby any building, construction or work of the said corporation, or any engine, machine or structure, or any matter or thing appertaining to the same shall be stopped, obstructed, impaired, weakened, injured or destroyed, the person or persons so offending shall forfeit and pay to the said corporation double the amount of damages sustained by means of such offence or injury, to be recovered in the name of the said corporation, with costs of suit, by action of debt.

SEC. 14. Each subscriber shall pay twenty per cent. on the amount subscribed by him, at the time of making such subscription; and it shall be lawful for the directors or a majority of them, to require payment of such other sums of the capital stock at such times and in such proportions and on such conditions as they shall deem fit, under the penalty of the forfeitures of all previous payments thereon, and shall give notice of the payments thus required, and of the place and time when the same are to be paid, at least thirty days previous to the payment of the same, in a public newspaper published in the city of New-York.

SEC. 15. The said corporation shall possess the general powers, and be subject to the general restrictions and liabilities prescribed by such parts of the eighteenth chapter of the first part of the Revised Statutes as are not repealed.

SEC. 16. *Nothing in this act shall be deemed to authorize* the said corporation to construct or use their single or double rail-road or way across or along any of the streets or avenues as designated on the map of the city of New-York, whether such streets or avenues shall have been opened or not, *without the consent of the mayor, aldermen and commonalty of said city,* who are hereby authorized to grant permission to the said corporation to construct their said rail-road or way across or along said streets or avenues, or prohibit them from constructing the same, and after the same shall be constructed, to regulate the time and manner of using the same, and the speed with which carriages shall be permitted to move on the same or any part thereof; and nothing in this act contained shall prevent the legislature from granting to any other corporation or persons, the right of constructing a rail-road or roads parallel wtih the one herein mentioned, or any part of it, on any lands, street, road or avenue not occupied by the rail-road or way hereby authorized, or the right of crossing or intersecting the same at any point or points, without making compensation for injuries sustained thereby.

SEC. 17. No person who shall at the time be a member of either branch of the common council of the city of New-York, shall act as commissioner or director of said corporation under this act.

SEC. 18. The legislature may at any time alter, amend, modify or repeal this act.

ACT FOR WIDENING FOURTH AVENUE.

CHAP. 274.

AN ACT to alter the map or plan of the city of New York.

Passed April 27, 1837.

The People of the State of New-York, represented in Senate and Assembly, do enact as follows:

SEC. 1. All that part of Forty-First-street lying between the Fifth and Sixth avenues; also all that part of

Sixty-Eight-street lying between the Third and Fourth avenues; also all those parts of Eightieth, Eighty-First, Eighty-Second, Eighty-Third, Eighty-Fourth and Eighty-Fifth-streets lying between the Sixth and Seventh avenues, as the same are laid out and designated on the map or plan of the city of New-York, are hereby discontinued on the said map or plan.

SEC. 2. The Fourth avenue shall be continued and extended on the said map or plan from Sixty-Sixth-street to Sixty-Eight-street. Also Avenue A and the First, Second, Third and Fourth avenues shall be respectively continued and extended on the said map or plan from One Hundred and Sixth-street to One Hundred and Ninth-street. Also One Hundred and Seventh and One Hundred and Eighth-streets shall be respectively continued and extended on the said map or plan from the Fifth avenue to the Harlaem river. And the owner or owners of the lands and tenements which shall be included in any blocks or plots of ground to be formed by such extension and continuation of the said avenues and streets, respectively, shall have, hold, occupy, possess and enjoy the same in like manner as he, she or they would have been entitled to do if the said avenues and streets had been originally so extended and continued on the said map or plan; and whenever the said avenues or streets, or any or either of them, shall be opened, the damage and benefit shall be estimated, assessed and paid, in like manner as the same would have been done if the said avenues and streets had been originally so extended and continued.

SEC. 3. All that part of the *Fourth avenue* in the city of New-York, lying between Thirty-Fourth-street, and the Harlaem river, *shall be widened* on the map or plan of the said city, by adding thereto, on each side thereof, twenty feet of *land, so as to make the whole width of that part of the said avenue one hundred and forty feet.*

SEC. 4. The said part of the Fourth avenue so to be widened is hereby declared to be one of the avenues of the city of New-York in like manner and with the like effect as if the same had been so laid out by the commis-

sioners appointed in and by the act, entitled "An act relative to improvements touching the laying out of streets and roads in the City of New-York, and for other purposes," passed April 3d, 1807.

ACT OF 1872 FOR CHANGES IN GRADE, ADDITIONAL TRACKS, ETC.

CHAP. 702.

AN ACT to improve and regulate the use of the Fourth avenue in the city of New York.

Passed May 14, 1872; three fifths being present.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The New York and Harlem Railroad Company is hereby authorized and required to *regulate the grade* of their railroad in the Fourth avenue of the city of New York, and to construct such viaducts, foot and road bridges over the same, and such excavations and tunnels under the same, with openings for proper ventilation, for the purpose of rendering the same safe and convenient to any persons crossing the same, and the railroad trains and passengers traveling thereon, in the following manner, namely: At Forty-fifth and Forty-eighth streets, to construct tunnels under the said streets and the Fourth avenue for sidewalks and carriage ways underneath the railroad at least thirty-four feet wide, or bridges over the railroad of at least that width, for the same purpose, and at Forty-sixth, Forty-seventh and Forty-ninth streets tunnels under the said streets and the Fourth avenue, or bridges over the same, at least twelve feet in width, for foot passengers. Said tunnels or bridges shall have easy approaches, and the tunnels shall be dry and thoroughly ventilated and lighted. Between Forty-eighth and Forty-ninth streets the grade of the railroad shall commence to descend, and shall descend as rapidly as the operation of the road will permit,

so that at Fifty-sixth street the grade of the railroad shall be thirteen feet six inches below the grade of the avenue; and from thence to Ninety-sixth street the road shall run through a covered way, with openings in the coverings not to exceed one hundred and fifty feet in length, and twenty feet in width in each block; and thence continuing upon the present grade to the center of One Hundred and Fifth street, and thence descending at the rate of about forty feet to the mile to the center of One Hundred and Twentieth street, where the said grade shall be fourteen feet one inch below the grade of the avenue; thence descending at the rate of about twelve feet and four-tenth of a foot to the mile to the center of One Hundred and Twenty-ninth street, where said railroad grade shall be eleven feet below the grade of the avenue; thence ascending at the rate of twenty-six feet and four-tenths of a foot to the mile to the center of One Hundred and Thirty-third street to and upon the present grade of the railroad; the grade of said road at Fifty-ninth street shall not exceed fifteen feet six inches below the grade of the said avenue as established by law. At Seventy-fourth street it shall not exceed thirteen feet six inches, and at Seventy-ninth street shall not exceed twelve feet. At Fiftieth and Fifty-first streets, elevated bridges of iron for foot passengers shall be constructed over the railroad. Between Fifty-second and Fifty-third streets a bridge shall be constructed for foot passengers and carriages over the railroad, with approaches parallel with the railroad, and at Fifty-fourth and Fifty-fifth streets bridges of iron shall be constructed for foot passengers over the railroad; and from Ninety-eighth street to One Hundred and Fifteenth street, the railroad shall be carried upon a viaduct, with stone arches or iron bridges in said viaduct over the cross or intersecting streets above One Hundred and First street, to and include One Hundred and Thirteenth street. Between One Hundred and Seventeenth and One Hundred and Eighteenth streets, a bridge shall be constructed over the railroad with parallel approaches, the same as before provided between Fifty-second and Fifty-third

streets; from One Hundred and Nineteenth street to One Hundred and Twenty-ninth street inclusive, iron bridges over the railroad shall be constructed upon the line of each street the full width of the street. At One Hundred and Thirtieth and One Hundred and Thirty-first streets, iron bridges for foot passengers shall be constructed over said railroad; between Forty-fifth and Forty-ninth Streets, including said streets, iron railings or brick walls shall be erected in said street, outside the railroad tracks, so as to prevent crossing at a level with said railroad tracks. A coping and iron railing shall be constructed upon the parapet and retaining walls along the said improvement, wherever the said roadway runs through an open cut, and also around the openings between Fifty-sixth and Ninety-six streets.

SEC. 2. During the progress of the work, the New York and Harlem Railroad Company is hereby authorized to lay down such additional temporary tracks on the Fourth avenue above Forty-second street, as may be necessary for the railroad business during the progress of the work, and such tracks shall be removed when the work shall be completed, *and said company is hereby authorized*, for the purpose of facilitating rapid transit and accommodating local traffic, *to lay down permanently two additional tracks on said avenue* and to make such landings and excavations in said avenue as may be required for such additional tracks, with landings for the entrance and delivery of passengers outside of the said excavations and viaduct.

SEC. 3. Whenever it shall be found advisable or necessary to alter the grade of the streets crossing the said avenue or of the said avenue, where the said road shall pass through a covered way, the same may be done by said company, but so as not to interfere with the free use of the streets by the public.

SEC. 4. The sidewalks on Fourth avenue between Forty-ninth and Fifty-sixth streets, and between Ninety-sixth street and the Harlem river, shall not exceed fifteen feet in width.

SEC. 5. Whenever it shall be necessary in the progress

of said work to remove or alter the Croton water pipes, sewers or gas pipes upon said avenue, the same shall be done by the department or corporation having in charge thereof, so as not to interfere with said work.

SEC. 6. There shall be a board of engineers, whose duty it shall be to execute, direct and superintend the construction of the said improvement, to be called the board of engineers of the Fourth avenue improvement. It shall be the duty of the said board to file a monthly statement, under oath, of the items of their expenditure with the comptroller of the city of New York. Regular accounts of all their transactions shall be kept by the board, which shall be open to the inspection of the officers of the said Railroad Company and to the Comptroller of the City of New York. The said board are authorized to pass suitable by-laws for their own regulation and government, and to select a presiding officer and secretary from their own number. They shall keep a record of all their proceedings. The said board shall consist of four members, as follows, namely: Allan Campbell and Alfred W. Craven, or their successors, and the chief engineer of the board of public works of the city of New York for the time being, and the engineer of the New York and Harlem Railroad company. In case of the death, removal or resignation of the said Campbell or Craven, or their or either of their successors, the vacancy shall be filled by the remaining members of the board. The said board are hereby authorized and directed to take the entire charge and control of the said improvement, and to execute the same in conformity with the provisions of this act, in a substantial and workmanlike manner. The said engineers shall receive eight dollars each for every day that they shall be employed in the performance of their duties under this act. They may appoint one of their number as a general superintendent of the work. The said board shall prepare plans and specifications of said improvement in conformity with this act, and an estimate of the expense thereof, and file a copy of such plans, specifications and estimate in the office of the comptroller of the city of New York. The members of the said board,

before entering upon the performance of their duties shall severally take and subscribe an oath or affirmation before some judge of a court of record in the city of New York, faithfully to perform the trust and duty required of them by this act and as a member of the said board of engineers, which shall be verified by such judge and filed in the office of the said comptroller.

SEC. 7. When the said plan, specifications and estimate shall be made and filed as aforesaid, the expense and cost of the said improvement shall be borne and paid by the New York and Harlem Railroad Company and the mayor, aldermen and commonalty of the city of New York in equal proportion as the construction of the said improvement progresses. When and as often as it shall appear by the certificate of the superintending engineer of the work upon the said improvement that the sum of twenty-five thousand dollars has been expended thereon by the New York and Harlem Railroad Company, specifying the portions and divisions of the said improvement where the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of the said city, and delivered to the said railroad company for and on account of the one-half of the expense and cost of said improvement to be borne and paid by the said city as aforesaid.

SEC. 8. For the purpose of raising the sum or amount of one-half of the estimated expense and cost of the said improvement, to be borne and paid by the city and county of New York, one-half of the proportion or amount to be borne and paid as aforesaid, or one-fourth of the whole estimated expense and cost, shall be raised by a tax upon the real and personal property subject to taxation in the city and county of New York, and included in the tax levy for the year eighteen hundred and seventy-two, and the remaining sum or one-half of the proportionate amount to be borne and paid by the said city and county shall be raised in like manner and included in

the tax levy for the year eighteen hundred and seventy-three. The comptroller of the city of New York is hereby authorized and directed to issue revenue bonds of the said city, in anticipation of the amount to be raised by taxation for the expense and cost of the said improvement in each year, to provide the means for paying the said proportion of the said city toward the said expense and cost, before the said tax shall be collected, not to exceed the due proportion to be borne and paid by the said city in each of the said years eighteen hundred and seventy-two and eighteen hundred and seventy-three; such bonds to be issued and sold at not less than par. So much of the proceeds of the said tax for each of the said years as may be necessary for the purpose shall be applied to the payment of the revenue bonds to be issued as aforesaid. It is hereby intended and declared that the payments by the city of New York are to be made in the proportion and as fast as they are made by the said railroad company during the progress of the work on the said improvement.

SEC. 9. The mayor, aldermen and commonalty of the city of New York are forbidden to obstruct the said improvement or the use of the Fourth avenue for that purpose above Forty-second street; and the said municipal corporation is hereby authorized and directed to pass and adopt such ordinances as may be requisite or necessary to facilitate the said improvement. Said tunnel and railways shall be exclusively for the uses and purposes of said railroad company, and it shall not be lawful for any person or persons, other than a public officer in the execution of his duty, as such, with his agents, and assistants, to enter or pass upon or through the same, or any portion thereof, on foot or in any other way than in the proper cars of this corporation provided for that purpose, without the consent of said corporation, under penalty of fifty dollars for each offense, to be recovered by this corporation.

SEC. 10. The said board of engineers shall begin the said improvement and proceed to the completion thereof with reasonable expedition. When completed the said

railroad company are authorized and directed to run by steam their trains (and such trains of other railroads as shall have obtained the consent of the New York and Harlem Railroad Company) over the said improvement and the route of the said railroad, and in and upon their depot at Forty-second street, and the switches, turnouts and sidings, now authorized by law north of said street.

SEC. 11. The Legislature may at any time alter, amend, or repeal this act.

SEC. 12. This act shall take effect immediately.

EXTRACT FROM RIVER AND HARBOR ACT OF 1890.

(U. S. Stats. At Large, Vol. 26, p. 437.)

"And the Secretary of War is directed to cause the low bridges now crossing said Harlem River to be replaced by other bridges at the expense of the owners thereof as soon as the necessary legislation, if any such legislation be necessary, shall have enabled the change in grade to the approaches of said bridges, thus required, to be made, the owners of said bridges being allowed a reasonable time in which to complete the work necessary for said approaches. Said bridges shall leave a clear space, between the under sides thereof and the high water of spring tides, of twenty-four feet, and shall be provided with draw-spans and draws of the width and length to be determined by the Secretary of War, and shall in all respects comply with this law and conform to the requirements of the Secretary of War: *Provided*, that the Secretary of War shall prescribe the times and regulations for the opening and operation of the draws in said bridges, but said draws shall not be opened except for vessels propelled by steam with or without vessels in tow; nor shall they be required to be opened at any times other than between ten o'clock in the forenoon and five o'clock in the afternoon."

ACT OF 1892 UNDER WHICH THE VIADUCT STRUCTURE WAS ERECTED.

CHAP. 339.

AN ACT to regulate, improve and enlarge Park avenue above One Hundred and Sixth street in the city of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes.

Approved by the Governor April 19, 1892. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The grade of the New York and Harlem railroad between One Hundred and Sixth street and the Harlem river, as now established by chapter seven hundred and two of the laws of eighteen hundred and seventy-two, shall be changed and altered as follows: Commencing at or about One Hundred and Sixth street, the grade shall ascend going northwardly at the rate of forty feet per mile to One Hundred and Sixteenth street; and thence the grade shall descend, going northwardly, at the rate of twenty-four and seven-tenths feet per mile to One Hundred and Twenty-ninth street; thence still descending northwardly at the rate of twenty-nine and six-tenths feet per mile to a point at about eighty feet southwardly from the present legally established bulkhead line on the south side of the Harlem river; thence going northwardly, the grade over the Harlem river shall be

level at an elevation of twenty-six feet above high-water line of spring tides, to a point at about eighty feet north of the present legally established bulkhead line, on the north side of the Harlem river; thence descending on a grade of not exceeding thirteen feet per mile to a point twenty feet south of the south line of One Hundred and Thirty-eighth street; thence still descending northwardly on a grade of not exceeding thirty-seven feet per mile to the south line of One Hundred and Forty-fourth street; thence still descending on a grade not exceeding twenty-nine feet per mile to the level of the roadbed of the New York and Harlem railroad, as now legally established and constructed, at or about the south line of One Hundred and Forty-ninth street.

SEC. 2. The viaduct structure, as it now exists between One Hundred and Sixth and the south side of One Hundred and Eleventh streets, shall be adapted to the new grade line as established by the preceding section by raising its parapet walls, and filling in with earth or other materials between the same, to the height required by the new grade; and from the south side of One Hundred and Eleventh street to the Harlem river, the railroad tracks and the roadbed shall be carried on *a viaduct structure* of iron or steel, or of both of these materials combined, consisting of three lines of plate girders, supported on columns of iron or steel, standing on suitable pedestals of stone or brick masonry, with foundations under the same of timber piling, or concrete, as may be found necessary.

SEC. 3. The present depressed cut of the railroad, extending from One Hundred and Fifteenth street to One Hundred and Thirty-third street shall be filled in with earth or other suitable material, and its parapet walls taken down below the line of the under side of the avenue paving; and the bridge which now carries One Hundred and Sixteenth street, the roadway between One Hundred and Seventeenth and One Hundred and Eighteenth streets, the bridges which carry one Hundred and Nineteenth, One Hundred and Twentieth, One Hundred and Twenty-first, One Hundred and Twenty-second, One Hundred

and Twenty-third, One Hundred and Twenty-fourth, One Hundred and Twenty-fifth, One Hundred and Twenty-sixth, One Hundred and Twenty-seventh, One Twenty-eighth and One Hundred and Twenty-ninth streets over the said depressed cut, also the foot bridges over the same at One Hundred and Thirtieth and One Hundred and Thirty-first streets shall be removed, and the space between the exterior lines of the said parapet walls shall form a part of Park avenue, and be paved with stone paving of the same character and description as Park avenue is now paved, and shall be laid in accordance with the grades of Park Avenue, as now established, and the iron bridges which now carry the railroad tracks over One Hundred and Twelfth and One Hundred and Thirteenth streets shall also be removed, or be raised to the new grade line.

SEC. 4. The new viaduct structure of iron or steel, provided for by section two, shall be built at such height that all streets from and inclusive of One Hundred and Twelfth street to the Harlem river, shall be passed over with a clear height of not less than fourteen feet above the surface of the pavement, and One Hundred and Fourteenth, One Hundred and Fifteenth, One Hundred and Seventeenth, One Hundred and Eighteenth, One Hundred and Thirtieth, One Hundred and Thirty-first, One Hundred and Thirty-second, One Hundred and Thirty-third streets and the exterior street along the bulkhead of the south side of the Harlem river, which do not now cross the said railroad, shall be opened, regulated and paved, and shall pass under the new viaduct structure the same as provided for all other streets in this section.

SEC. 5. The supporting columns of the new viaduct structure shall divide it into spans of about sixty-five feet center to center longitudinally with the railroad and be disposed in groups of three transversely at right angles, one column on the center line of the railroad, and one column on each side of said center line at a distance not to exceed twenty-eight feet each way between the center of said columns, excepting that at the crossings of One

Hundred and Sixteenth and One Hundred and Twenty-fifth streets, and the exterior street (being one hundred feet in width) columns may be erected on the center line of said streets and also on the curb lines; and the said columns shall not exceed twenty-four inches by twenty-four inches of extreme external diameter above the level of the street pavement and shall be protected at their bases on the pavement with circular cast-iron wheel guards of sufficient diameter to defend the shafts of said columns from abrasion.

SEC. 6. The railroad tracks shall be carried on a solid tight floor, and the drainage water shall be conducted by pipes into the sewers.

SEC. 7. The New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, is hereby authorized and permitted, at its election, to erect station-houses on both sides of the railroad at One Hundred and Twenty-fifth street, with platforms extending from the north line of One Hundred and Twenty-fourth street to the south line of One Hundred and Twenty-sixth street; and for the support of the girders to sustain such stations and platforms, columns may be erected along the curb lines of Park avenue, between One Hundred and Twenty-fourth and One hundred and Twenty-Sixth streets, and on the curb lines of One Hundred and Twenty-fifth street east and west of Park avenue as may be necessary, the said station columns not to exceed fifteen inches square in size above the surface of the pavement. The said stations and platforms shall be reached by stairs not less than five feet in width, which shall terminate on the side-walk pavement on both sides of One Hundred and Twenty-fifth street, east and west of Park avenue, and also upon the pavement on both sides of Park avenue adjacent to the north line of One Hundred and Twenty-fourth street and the south line of One Hundred and Twenty-sixth street. The station-houses may be built over the roadway of One Hundred and Twenty-fifth street, and may be of a length equal to the distance between the curb lines of the same.

SEC. 8. The Harlem river shall be crossed by the four tracks of the said railroad on a pivot draw-bridge, the center of which shall coincide with the center of the draw-bridge now standing, but the new bridge shall be so built that the lowest part of its structure shall have a clear height of twenty-four feet above high water of spring tides, and shall provide passageway for vessels on both sides of the centre pier, each of one hundred feet in width in clear, measured at right angles to the axis or current of the river at the point of its passage under this bridge; the extreme ends of the draw-bridge shall be sustained on abutments of stone masonry, and a protection pier of proper width, to effectually protect the structure of the draw-bridge, when swung open for the passage of vessels, may be built in the river on a line parallel with the direction of the current of the river, no part of which, however, shall in any way diminish the clear width of one hundred feet passageway on both sides of the same.

SEC. 9. From the north abutment of the Harlem river bridge the new grade of the railroad shall be carried on a viaduct structure consisting of parallel retaining walls of stone masonry, with earth filling, to the south side of One Hundred and Thirty-eight street, with suitable openings for the passage of One Hundred and Thirty-fifth street and Mott avenue; over which streets the railroad shall pass on bridges of iron or steel supported on stone abutments; the railroad tracks shall be carried over One Hundred and Thirty-eight street on a bridge of iron or steel, of one hundred feet in width, divided into three spans consisting of one clear span over the roadway between the curb lines, and with side spans over each of the sidewalks supported on stone masonry abutments built upon the north and south lines of said street, and by iron columns on the curb lines.

SEC. 10. In order to secure fourteen feet clear of headroom under the lowest part of the bridge carrying the railroad tracks over One Hundred and Thirty-eight street, the grade level of One Hundred and Thirty-eight street as now established, shall be altered and be depressed

under the said bridge, one and one-half feet, and the bridge which now carries One Hundred and Forty-fourth street over the depressed tracks of the New York and Harlem railroad may be raised to a height not exceeding seven and one-half feet above its elevation as now constructed, and the grades of the streets and avenues forming the approaches to the said bridge, that is to say, on One Hundred and Thirty-eight street between Mott avenue and railroad avenue, and on One Hundred and Forty-fourth street eastwardly and westwardly from the railroad bridge, and on Railroad avenue northwardly and southwardly from One Hundred and Forty-fourth street, shall be altered and changed to correspond with the depression of One Hundred and Thirty-eighth street grade, and the raising of One Hundred and Forty-fourth street bridge, in such manner as may be prescribed by the municipal authorities having jurisdiction in the premises.

SEC. 11. North of the north abutment of One Hundred and Thirty-eighth street bridge to One Hundred and Forty-ninth street the roadbed of the railroad may be raised to its new grade level by filling of earth, or in any other way, at the discretion of the railroad company.

SEC. 12. The New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, during the making of the change in the elevation of the aforesaid structure and bridge is authorized to construct a temporary bridge over the Harlem river and to maintain such temporary structures as may be found necessary for the operation of its road, and to occupy any part or parts of any public streets or avenues in the city of New York necessary for such purposes, all of which, however, shall be done under the approval, direction and sanction of the board hereinafter appointed.

SEC. 13. There shall be a board whose duty it shall be to execute, direct and superintend the construction of the said improvement from One Hundred and Sixth street to the line of the Harlem river or point at which the new bridge over the Harlem river, authorized by this act to be constructed, shall commence, which board shall be

called "The Board for the Park Avenue Improvement above One Hundred and Sixth Street." It shall be the duty of the said board to file a monthly statement under oath of the items of its expenditures with the comptroller of the city of New York. Regular accounts of all its transactions shall be kept by the board, which shall be open to the inspection of the officers of the said railroad company and to the comptroller of the city of New York. The said board is authorized to pass suitable by-laws for its own regulation and government, and to select a presiding officer and secretary from its number. It shall keep a record of all its proceedings. The said board shall consist of five members, to be appointed by the mayor of the city of New York, two of whom shall be civil engineers experienced in railroad and bridge construction. In case of the death, removal or resignation of any member of the said board, or their or either of their successors, the vacancy shall be filled by appointment by the mayor of the city of New York. The said board is hereby authorized and directed to take the entire charge and control of the said improvement from One Hundred and Sixth street to the line of the Harlem river, or the point at which the new bridge over the Harlem river authorized by this act, to be constructed shall commence, and to execute the same in conformity with the provisions of this act, in a substantial and workmanlike manner. Such work shall be done, so far as possible, by contract. Advertisements shall be made as the board shall direct, for bids or proposals for the work proposed from time to time to be contracted, and the contracts shall be awarded to the lowest responsible bidder who shall be approved by the board. The contractors shall be required to give such bonds for the faithful performance and execution of the work as the said board shall require. Each member of the board shall receive ten dollars for every day that he shall be employed in the performance of his duties under this act. The board may appoint one of its number as a general superintendent of the work. The said board shall prepare plans of said improvement in conformity with this act, which when approved by the commissioner of

public works shall be filed in the office of the comptroller of the city of New York. The said board shall also file with the comptroller specifications and an estimate of the cost of said work. The members of the said board before entering upon the performance of their duties, shall severally take and subscribe an oath or affirmation before a judge of a court of record of the city of New York, faithfully to perform the trusts and duties required of them by this act and as a member of the said board, which oath shall be filed in the office of the comptroller of the city of New York. All work to be done upon or under any street, between One Hundred and Sixth street and the south line of the Harlem river shall be done under the supervision of the department of public works, and the commissioner of public works shall appoint necessary inspectors and engineers for the supervision of such work, who shall be paid a reasonable compensation to be included in the cost of said improvement.

SEC. 14. When the said plan, specification and estimate shall be made and filed as aforesaid, the expense and cost of the said improvement shall be borne and paid by the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, and the mayor, aldermen and commonalty of the city of New York, in equal proportions as the construction of the said improvement progresses. When and as often as it shall appear by the certificate of the superintending engineer of the work of the said improvement, duly certified by the aforesaid board, that the sum of twenty-five thousand dollars has been expended thereon by either of said railroad companies, specifying the portions and divisions of the said improvement where the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company bearing and paying said expense, for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of said city, upon whom by law is devolved the duty of signing and countersigning warrants, and deliver it to the said railroad com-

pany for and on account of the one-half of the expense and cost of the said improvement to be borne and paid by the city as aforesaid; but in no event shall the proportion of the cost of said improvement to be paid by the city of New York exceed the sum of seven hundred and fifty thousand dollars, and if the cost of said improvement shall exceed the sum of one million five hundred thousand dollars, then the entire excess over and above such sum shall be borne and paid by the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company.

SEC. 15. For the purpose of raising the sum or amount of the cost of the said improvement to be borne and paid by the city of New York, it shall be the duty of the comptroller and other proper officers of the city of New York to borrow, from time to time, by the issue of bonds, bearing such rates of interest as they may deem proper, not exceeding four per centum per annum, payable semi-annually, such sums as may be necessary to pay the one-half part of all amounts called for by the certificates of the superintending engineer provided for in the preceding section of this act. Such bonds shall be known as assessment bonds for the Park avenue improvement above One Hundred and Sixth street. Such bonds shall be issued by the comptroller when authorized by the board of estimate and apportionment at not less than par, for such period as said comptroller may determine, not exceeding five years. Such bonds shall be sold by the comptroller by inviting proposals therefor by public advertisement for not less than ten days, and the same shall be awarded to the highest bidder therefor, and said proposals shall be only publicly opened by the comptroller in the presence of the commissioners of the sinking fund, or such of them as shall attend at the time and place specified in the advertisement therefor. The comptroller with the approval of said commissioners, shall determine what, if any, of such proposals shall be accepted, and upon the payment into the city treasury of the amounts due by the persons whose bids are accepted respectively, certificates therefor shall be issued to them as authorized by law.

SEC. 16. Upon the completion of such work and final payment by the comptroller of the proportion of the cost of said improvement to be borne by the city of New York, the mayor, aldermen and commonalty of the city of New York by the counsel to the corporation of said city, is hereby authorized and directed to make application to a special term of the supreme court in and for the first department, for the appointment of commissioners of assessment, and the said court shall thereupon name three discreet and disinterested persons, being citizens of the city of New York, as such commissioners of assessment, for the purpose of performing the duties hereinafter mentioned in that behalf prescribed. Twenty days' notice of such applications shall be published in the City Record and in at least two other newspapers published in the city of New York. Upon the appointment of said commissioners, they shall severally take and subscribe an oath or affirmation before some officer authorized to administer oaths, faithfully to perform the trusts and duties required of them by this act, which oaths shall be annexed to and filed with their report. In case of the death, resignation or refusal to act of any such commissioner of assessment, it shall and may be lawful for the court aforesaid, or any one of the justices thereof, on the application of the mayor, aldermen and commonalty of the city of New York as often as such event shall happen, to appoint a discreet and disinterested person, being a citizen of the city of New York, as such commissioner of assessment in the place and stead of such commissioner so dying, resigning or refusing to act, and the surviving or acting commissioners, as the case may be, shall have full power to proceed in the execution of their duties under their appointment until a successor of such commissioner so dying, resigning or refusing to act shall be appointed. It shall be the duty of said commissioners to view the improvement provided for by the terms of this act from One Hundred and Sixth street north to the Harlem river, and all such lands, tenements, hereditaments and premises as they may ultimately include within the area of assessment that may be fixed and determined

by them, and shall proceed to determine the area upon which an assessment shall be imposed sufficient to meet and pay the entire amount of the assessment bonds which may be issued in pursuance of the provisions of section fifteen of this act, together with interest on such bonds to the date of the levying of such assessment, or such portion of said bonds and interest as the said commissioners of assessment shall determine should be paid by assessment. It shall and may be lawful to and for the said commissioners of assessment in their discretion, if they deem it equitable and just so to do, but not otherwise, to assess the whole or any part of the said bonds and interest upon the mayor, aldermen and commonalty of the city of New York. Any area of assessment shall be made so as to include all such lands, tenements, hereditaments and premises as may by said commissioners be deemed to be benefited by the said improvement, and no others; and having fixed such area and the amount of said bonds, and the interest thereon to be paid by assessment, it shall be the duty of the said commissioners to make a just and equitable assessment of the benefit to the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises included within the said area or assessment. In each and all and every case and cases where owners or parties interested, or their respective estates and interests are unknown or not fully known to the said commissioners, it shall be sufficient for them to estimate and to set forth and state in their report in general terms the respective sums to be paid, without specifying the names of the estates or interests of such owners, proprietors or parties interested, or either of them. On the coming in of the said report, signed by said commissioners, or a majority of them, the said supreme court shall, by order, upon the application of the mayor, aldermen and commonalty of the city of New York, after hearing any matter which may be alleged against the same, either confirm the said report in whole or in part, or refer the same back to the same commissioners for revisal or correction, or to new commissioners to be appointed by the

said court to reconsider the subject-matter thereof, and the said commissioners to whom the said report shall be so referred shall return the said report corrected and revised, or a new report to be made by them as aforesaid in the premises, to the said court, without unnecessary delay; and the same, on being so returned, shall be confirmed or again referred back by the said court as justice shall require; and such report, when confirmed by the said court, shall be final and conclusive as well upon the said mayor, aldermen and commonalty of the city of New York as upon the owners, lessees, persons or parties interested therein and entitled to the lands, tenements, hereditaments and premises mentioned in the said report, and also upon all other persons whomsoever.

SEC. 17. The said commissioners of assessment, at least thirty days before they present their report to the supreme court, shall deposit a true copy or transcript of the same in the office of the comptroller of the city of New York, for the inspection of whomsoever it may concern, and shall give daily notice, by advertisement in the newspapers mentioned in the sixteenth section of this act, for thirty days after depositing such report as aforesaid, of the said deposit thereof in the said office, and of the day on which such report will be presented to the said court; and any person or persons whose rights may be affected thereby and who may object to the same or any part thereof, may, within thirty days after the first publication of such notice, set forth their objections to the same in writing to the said commissioners, who shall, after hearing the parties so objecting, thereupon reconsider their said assessment or part or parts thereof so objected to, and in case the same shall appear to them to require correction, and not otherwise, they shall and may correct the same accordingly. The said commissioners shall include in said report the amount of their fees, and all costs and disbursements for expenses, for surveys, maps and other things.

SEC. 18. In each and every case of the appointment of commissioners under this act, it shall be competent

and lawful for any two of such commissioners so appointed as aforesaid, to proceed and to execute and perform the trusts and duties of their said office, and their acts shall be as valid and effectual as the acts of all the commissioners so to be appointed, if they had acted together, would have been; and further, in all cases, the acts, proceedings and decisions of a major part of such of the commissioners as shall be acting in the premises shall be as binding, valid and effectual, as if the said commissioners appointed for such purpose had all concurred and joined therein. The commissioners appointed under and by virtue of this act, who shall enter upon the duties of their appointment, shall each be entitled to receive such compensation as shall be awarded by the court upon the confirmation of their respective reports, not exceeding ten dollars for each day they shall respectively be actually employed in the duties of their appointment, besides all reasonable expenses to be taxed and allowed by said court for maps, surveys, clerk hire and all necessary expenses and disbursements, and the same shall be included in and considered and paid as part of said assessment.

SEC. 19. The respective sums so as aforesaid assessed by the said commissioners upon the owners and occupants and parties seized or possessed of or interested in the lands, tenements, hereditaments and premises mentioned in the report of said commissioners, and reported by said commissioners as and for the payment to be made by the parties and persons respectively in the said report mentioned or referred to, and intended as owners and proprietors of or parties interested in lands and premises deemed to be benefited for the benefit and advantage to be derived from the said improvement, shall be a lien or charge on the lands, tenements, hereditaments and premises in the said report mentioned, or upon the estate and interest of the respective owners, lessees and parties interested in said lands, tenements, hereditaments and premises, for or on account of which the said respective sums shall be so assessed by said commissioners upon the respective owners and

proprietors thereof, and parties interested therein; as well the said owners and proprietors thereof and parties interested therein, and also the occupants, and each and every of them, shall, moreover, be respectively liable to pay on demand the respective sum or sums or assessments mentioned in said report at which the respective lands, tenements, hereditaments and premises so owned and occupied by him, her or them, or wherein he. she or they are interested, or at which the owners or proprietors thereof shall be so assessed, to such person or persons as the comptroller of the city of New York shall appoint to receive the same. The said respective sums or asments with lawful interest from the date of the confirmation of the report, may be collected, with all costs and charges by action of the said mayor, aldermen and commonalty of the city of New York from and against the parties assessed, or the owner or owners of the respective lands, tenements, hereditaments and premises whereof or in respect of which the same may be assessed or set forth in the said report of the said commissioners, or from or against any or either of the said parties or owners without joining any other or others of them, the said parties or owners.

Sec. 20. The moneys collected pursuant to the provisions of sections sixteen, seventeen, eighteen and nineten of this act shall be set apart, when collected, as a trust fund, to apply to the redemption of the principal and interest of the bonds for the payment of which said assessment shall have been imposed. In the event that the said commissioners of assessment shall have, in pursuance of the provisions of section sixteen of this act assessed the payment of the whole or any part of said bonds upon the mayor, aldermen and commonalty of the city of New York, the funds to pay the same shall be raised by tax upon the real and personal property subject to taxation in the city and county of New York, and included in the tax levy for the years in which the said bonds shall fall due. The interest on all of the said bonds shall be paid by the city of New York until the same shall fall due, and the amount thereof shall be raised from year to year,

by tax upon real and personal property subject to taxation in the city and County of New York but any interest that may accrue upon the aforesaid trust fund shall be applied in payment of said interest, and from the time that said trust fund shall be established, the balance of the interest only over and above the amount that may be earned from said trust fund shall be raised by taxation as aforesaid.

SEC. 21. The new bridge over the Harlem river, authorized to be constructed, by the provisions of this act, and the approaches to such bridge authorized to be constructed on the north side of the Harlem river in the twenty-third ward, shall be constructed at the sole expense of the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company. The said railroad company shall prepare plans and specifications of said bridge and its approaches on the north side in the twenty-third ward in conformity with this act, and file a copy of such plans and specifications in the office of the Comptroller of the city of New York. The said corporation is authorized and empowered to conform the structure of the said bridge to such plans and directions as shall be approved and given by the secretary of war, pursuant to authority conferred upon him by act of congress, and except so far as the structure of said bridge shall be subject to the direction of said secretary of war, the plan therefor, and the approaches thereto on the north side in the twenty-third ward, shall be approved by the board appointed in pursuance of the provisions of this act.

SEC. 22. All changes is the railroad necessary to conform the grade thereof on the north side in the twenty-third ward, when elevated as aforesaid, to the new elevation, are hereby authorized and directed, and all grades of the said railroad established by any prior act or acts, or by any contract made by the railroad company owning, or leasing and operating said railroad, or by both, with any public department of the city of New York, or with the city of New York, pursuant to any act of the leg-

islature, are hereby changed to conform to the provisions of this act.

SEC. 23. All bridges over the New York and Harlem railroad required to be made by any act or contract pursuant to any act of the legislature of the state of New York which will be interfered with by the change in grade of said railroad required by the provisions of this act, are hereby authorized to be removed except the bridge at One Hundred and Forty-fourth street, which is authorized to be raised as aforesaid, and the obligation to make and continue the same, as imposed by any act or part of any act, or by any contract made pursuant to any act of the legislature of the state of New York, is hereby removed and annulled, anything in any act of the legislature of the state of New York, or in any contract made pursuant to any act of the said legislature of the state of New York, with any public department of the city of New York, or with the city of New York, to the contrary notwithstanding.

SEC. 24. The mayor aldermen and commonalty of the city of New York, is hereby authorized and directed to pass and adopt such ordinances as may be requisite or necessary to facilitate the said improvement. Said improved structure and bridge shall be exclusively for the uses and purposes of the railroad company, and it shall not be lawful for any person or persons, other than a public officer in the execution of his duty as such, with his agents, or assistants, to enter or pass upon or through the same or any portion thereof, on foot or in any other way than in the proper cars of such corporation provided for that purpose, without the consent of said corporation, under a penalty of fifty dollars for each offense, to be recovered by said railroad corporation.

SEC. 25. The cost of the construction of all stations upon said railway, whether provided for in this act or not, shall be borne by the said railroad corporations or either of them, and shall not be included in the estimate to be made by said board of the cost of the proposed improvement from One Hundred and Sixth street to the Harlem river, or the point at which the new bridge over

the Harlem river authorized by this act to be constructed, shall commence.

SEC. 26. Said board shall begin the said improvement and proceed to the completion thereof with reasonable expedition. When completed, the New York and Harlem Railroad Company and its lessee, the New York Central and Hudson River Railroad Company so long as it remains such lessee, are authorized and directed to run by steam their trains and such trains of other railroad companies as shall have obtained permission therefor voluntarily given by either one of said companies which may be operating said railroad, over the said improvements and the route of the said railroad, and in and upon the depot at Forty-second street, and the switches, turnouts and sidings now authorized by law north of said street; and no trains of other companies, without such permission, shall be run thereon.

SEC. 27. The board appointed pursuant to the provisions of this act shall act upon any and all questions by a majority vote of its members.

SEC. 28. This act shall take effect immediately.

OPINION OF N. Y. COURT OF APPEALS IN THE CONABEER CASE, 1898.

This decision has little bearing on the case. The Act of 1892 is not involved or discussed, because the action was brought in 1891 before that Act was passed. It was decided in favor of defendant on the ground that plaintiff's predecessors in title had expressly consented to the construction and operation of the railroad.

Court of Appeals.

HANNAH CONABEER, *Appellant*,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY and The New York and Harlem Railroad Company, Respondents.
} 156 N. Y., 474.

Argued June, 1898; decided October, 1898.

Appeal from a judgment of the late General
(476) Term of the Supreme Court in the first judicial department, entered January 26, 1895, affirming a judgment in favor of defendants entered upon a decision of the court dismissing the complaint on the merits on trial at Special Term.

This action was commenced on the twentieth of November, 1891, to obtain an injunction perpetually restraining the further operation of the defendants' railroad in Park avenue, formerly known as Fourth avenue, in the city of New York, opposite the premises of the plaintiff, and for damages to the rental value thereof.

In 1807, by chapter 115, of the laws of that year, three commissioners were appointed who were empowered to lay out streets and avenues upon the northern portion of Manhattan Island, which included the locality in question. On April first, 1811, they filed a map showing the streets and avenues as they now generally exist. Upon this map One Hundred and Fourth street was shown to be of

the width of sixty feet, and Fourth avenue of the width of one hundred feet. That act also provided that the map, plans and surveys so made and filed should be final and conclusive as to the mayor, aldermen and commonalty of the city of New York, the owners and occupants of lands within the boundaries of the streets, and in respect to all other persons whomsoever. For many years after the filing of this map these streets remained unopened and had no existence, except that which resulted from their being designated as such on the map.

In 1831, by a special act of the legislature (Ch.
(477) 263), the New New York and Harlem Railroad Company was incorporated, with power to construct a railroad from any point on the north bounds of Twenty-third street to the Harlem river, between the east bounds of Third avenue and the west bounds of Eighth avenue, with the right to operate it by steam, or by any mechanical or other power that the company might choose to employ. By that act it was given the right to locate its railroad and to file a map thereof in the office of the register of New York, but it was not to be filed until it should have been submitted to, and approved by, the common council. It was then authorized to build its road, to take all lands and real estate necessary for its construction, and to receive or take all voluntary grants or donations of land to aid in the accomplishment of that work. The act likewise provided that lands thus taken, which were not donated, should, if the parties could agree, be purchased of the owners at a price agreed upon between them, and then provided for condemnation when an agreement could not be had. It declared that the corporation was authorized to construct such a railroad, to use single or double tracks, and that in case its railroad was located along any public street or avenue then laid out upon the map or plan of the city of New York, it should leave sufficient space in the street on each side of the railroad for a public highway for carriages and a sidewalk for foot passengers. It also provided that the corporation should not be deemed to be authorized to construct a railway across or along any of the streets

thus designated, whether open or not, without the consent of the mayor and aldermen, who were authorized to grant permission to the corporation to construct its railroad across or along the streets or avenues of the city.

The provisions of this act were complied with by the New York and Harlem Railroad Company, and it located its route along the center line of Fourth avenue, from Twenty-third street to the Harlem river, and filed a map in the register's office, October 22, 1831, together with a resolution of the common council, approved by the mayor, authorizing the company to construct its
(478) road over Fourth avenue. It obtained the consent of the municipal authorities to the location of such road by an ordinance approved by the mayor, December 22, 1831.

At that time the locality which included the premises in question consisted of farm lands and salt meadows, known as a part of the "Harlem Flats," a portion of which was owned by one Margaret McGown. On the eighteenth of January, 1832, Mrs. McGown conveyed to the New York and Harlem Railroad Company and its successors a portion of the land owned by her, consisting of twenty-four feet of land running through the center of Fourth avenue between Ninety-seventh and One Hundredth and Sixth streets for and during the period it might remain an incorporated company, on which to construct its railroad, but for no other purpose, with the right to slope its embankments or excavations so much farther beyond the line of the premises granted as might be necessary to support its work, not, however, to extend beyond the width of the avenue, which was one hundred feet.

Some time anterior to 1835, the railroad company constructed along this portion of Fourth avenue a stone viaduct upon the land in question, upon which two tracks were laid. The only difference between the old viaduct and the one now complained of is that the width of the latter was increased sixteen feet on each side, and accommodated two additional tracks.

In 1835, the matter of widening Fourth avenue from

one hundred to one hundred and forty feet was brought before the common council by a petition requesting that the avenue be thus widened. One, if not the chief, ground upon which this was asked was the existence of the railroad in the center of that avenue. Subsequently, and in 1837, the street was widened to one hundred and forty feet.

Fourth avenue was not opened until nearly twenty years after the construction of the defendant's road over this part of it. In the proceedings for opening that street, the city of New York assumed to acquire the title to the strip of land upon which the defendants' road was constructed, and for which a nominal award of one dollar was made for each of the lots across which it
(479) passed. No attempt was made by the city to acquire the easements secured by the railroad company under its deed from Mrs. McGown, either as to its right to build and maintain its road along the strip purchased of her, or to slope its embankments and excavations so far as necessary to support the work. The possession by the railroad company of the portion of the street thus occupied was not attempted to be disturbed by the city. When the street was opened in December, 1853, the railroad was upon a high viaduct along the center of the avenue, which was in the exclusive possession of the New York and Harlem Railroad Company. The portion so occupied has never been used as any part of the public street.

In 1872, by chapter 702 of the laws of that year, the legislature passed an act to improve and regulate the use of Fourth avenue in the city of New York. That act authorized and required the railroad company to regulate the grade of its railroad in Fourth avenue in a manner specified, and to construct such viaducts, bridges, excavations, tunnels and openings as were therein described. It provided that from Fifty-sixth to Ninety-sixth street the railroad should run through a covered way with openings therein, and thence continue upon the grade as it then existed to the center of One Hundred and Fifth street. It also authorized the railroad company, for the purpose

of facilitating rapid transit and accommodating local traffic, to lay two additional tracks on such avenue, and to make such landings and excavations therein as might be required for the tracks and the entrance and delivery of its passengers outside of the excavations and viaduct. It created a board of engineers to execute, direct and superintend the construction of such improvement, the expense thereof to be borne by the city and the railroad company in equal proportions. It forbade the municipal authorities of the city from obstructing the use of Fourth avenue for that purpose above Forty-second street, authorized the municipal corporation to pass such ordinances as might be requisite or necessary to facilitate the improvement, provided that the railway be exclu-
(480) sively for the uses and purposes of the railroad company, and that the legislature might at any time alter, amend or repeal that act.

This improvement was carried on and completed under the direction of a board of engineers appointed by the legislature for that purpose. The height of the old viaduct at One Hundred and Fourth street, opposite the premises now owned by the plaintiff, was unchanged. The improvement at that point consisted in taking down the old viaduct and erecting a new one of the same height, but fifty-six feet wide. It was completed in 1873, in which year the New York and Harlem Railroad Company leased to the New York Central and Hudson River Railroad Company its railway for four hundred and one years. Since that time the railroad as then constructed has been in the possession of and operated by the latter company as such lessee.

In 1887, fourteen years after the improvement directed by the statute of 1872 was completed, the plaintiff purchased her lot at the corner of Fourth avenue and One Hundred and Fourth street. It was a part of the premises owned by Mrs. McGown in 1832, when she deeded the land in Fourth avenue to the Harlem Railroad Company. Upon the plaintiff's lot there was at the time of her purchase, and still is, a three-story and basement brick and stone building used as a dwelling house. Since

June, 1887, she has been the owner in fee and in possession and occupancy of the premises thus purchased.

Since the lease to the New York Central and Hudson River Railroad Company it has maintained and operated the railroad upon such viaduct and runs thereon a large number of trains during the day and night drawn by locomotives, and in its operation steam, smoke, noxious and unpleasant gases, vapors, coal, soot, cinders, ashes and sparks have been and are frequently emitted from such locomotives which fall upon the plaintiff's premises; loud and disagreeable noises have been and are produced by its operation; the free, steady and natural passage of light is interrupted, and dark shadows and bright
(481) flashes of light are produced. The viaduct and railway structures are of a lasting and permanent nature, intended for continuous and permanent use, and the defendants intend to continue to maintain, use and operate a railroad thereon.

The viaduct is about forty feet from the building line upon Fourth avenue. Of this, twenty-five feet in width on each side are used as a roadway for teams, carriages and other vehicles, and fifteen feet as a sidewalk. The street-line is now forty-two feet from such viaduct, while before the widening of Fourth avenue the street line was only thirty-eight feet from the viaduct as first constructed.

Joseph Ullman for appellant.

Ira A. Place, Alexander S. Lyman and *Hamilton Harris* for respondents.

(482) MARTIN, *J.* It is obvious that when the deed by Mrs. McGown to the New York and Harlem Railroad Company was given, it was understood between the parties that its railroad was to be built upon an embankment or viaduct in Fourth avenue, as it expressly provided not only that the grantee should have twenty-four feet of land in the center of the avenue during its corporate existence upon which to construct its railroad, but it also conferred upon the company the right to slope its

(483) embankment to the full width of the street. It is equally apparent that the grantor intended to confer upon the railroad company the right to construct, maintain and operate a steam railroad upon the premises so conveyed, and to thereby release it from any damages to her adjoining property arising from the proper exercise of that right. Thus the property now owned by the plaintiff which adjoins Fourth avenue became burdened with the easements or right of the company to maintain and operate its railroad at that place, so that neither the owner, nor her grantee, could recover damages for any injury to the property arising from the contemplated use, and could in no way interfere with the proper exercise of that right by the railroad company during its continuance.

The only injury or interference with the premises now owned by the plaintiff was found by the trial court to have been caused by acts and conditions which were necessarily and naturally incident to the operation of a steam railroad. The court expressly declined to find that those acts and conditions deprived the plaintiff of her property in the avenue, or of the easements appurtenant thereto, or to find that access to the premises, or the approach of light and air thereto, was obstructed otherwise than by acts and conditions which were incident to the operation of the defendants' railroad. It also declined to find that the construction and operation of the defendants' railroad had diminished the value of the plaintiff's premises.

An examination of the evidence contained in the record shows quite plainly that the trial court was justified in declining to find that the plaintiff's access, light and air were obstructed, except in the manner stated. Therefore, the question presented is whether, under the proof contained in the record, the plaintiff was entitled to restrain the defendants from operating their road upon the viaduct in front of her premises, upon the ground that it affected them in the manner in which the operation of a steam railroad thus located naturally and necessarily would.

It is to be remembered that Mrs. McGown was the common source of title to both the plaintiff's
(484) and the defendants' lands, and that prior to her transfer of the premises now owned by the plaintiff she had transferred to the Harlem Railroad Company the right to build, maintain and operate its road in the center of the avenue where it is now located, thereby imposing upon the remainder of her land the burden of the presence of a railroad at that place to be maintained and operated as such. When she granted that right, it was the understanding of the parties that the premises granted were to be thus used, and was upon her part an irrevocable grant to the New York and Harlem Railroad Company and its successors of the right to so use the avenue during the period of the incorporation of that company. It in effect released to it any consequential damages to her remaining property which might be occasioned by the annoyances or injuries resulting from the operation of the road.

When that right was granted, Fourth avenue was but one hundred feet in width, and the viaduct or embankment first constructed by the defendants was at most but thirty-eight feet from the exterior street line. Since that time the street has been widened to one hundred and forty feet, so that the street line is now forty-two feet from the defendants' viaduct.

It is claimed by the plaintiff that, as the New York and Harlem Railroad Company used only twenty-six feet of the avenue for the construction of its first viaduct, it waived any right it possessed in the remainder of the street, and, consequently, was entitled to maintain its viaduct upon that portion of the street only. Where a right is obtained by prescription, the measure of the right is controlled by the extent of the use. But where, as in this case, there is an express grant, the fact that the grant to its fullest extent is not immediately used will not amount to an abandonment or waiver of the rights thus expressly granted. Where one acquires a title by deed, it will not be affected by non-user unless there is a loss of title in some of the ways recognized by law. Mere non-user,

however long continued, does not create an abandonment. (*Welsh* v. *Taylor*, 134 N. Y., 450; *Haight* v. *Lit-*
(485) *tlefield*, 147 N. Y., 338.) Therefore, as between the plaitiff's grantor and the defendants, it is quite evident that the latter may exercise all the rights conferred upon them by the deed of Mrs. McGown, unless there has been a loss of that right in some of the ways recognized by law. There is no proof of any such loss. That the plaintiff's remote grantor, Mrs. McGown, surrendered the easements in Fourth avenue appurtenant to her abutting property, so far as the same were affected by the erection and operation of this railroad, there is no doubt and the plaintiff could acquire no greater rights than were possessed by her. This court has several times held that a release or abandonment of the easements of light, air and access which are appurtenant to property abutting upon a public street may be established by any evidence which clearly indicates an intention upon the part of an abutting owner to abandon the right, at least where it has been acted upon by the other party. That the deed from Mrs. McGown to the defendant effected such a release and abandonment is obvious. (*White* v. *M. R. Co.*, 139 N. Y., 19; *Foote* v. *M. E. R. Co.*, 147 N. Y., 367; *Ward* v. *M. E. R. Co.*, 152 N. Y., 39.)

Although, under the statute of 1807, the commissioners appointed made a map which included Fourth avenue, still, until the street was opened and the damages to the owners of the land paid, the title remained in the latter. By the laws of 1831 the Harlem Railroad Company was vested with power to purchase and hold such real estate as was necessary for the purposes of its incorporation, and was authorized to build its road in the public streets or avenues laid out on the map of the city. That act also provided that sufficient space on each side of the railroad should be left for a public highway for carriages and for a sidewalk for foot travelers. These rights were reserved and granted, subject to the approval of the mayor, aldermen and commonalty of the city, which was obtained. In 1832, in pursuance of the power thus conferred, the New York and Harlem Railroad

(486) Company purchased the right of way of Mrs. McGown, to which we have referred, and the road was constructed thereon. In 1835, with the consent of the legislature, the municipality widened this street and opened on each side of the defendants' railroad streets for teams and foot travelers as required by the statute to which we have adverted. When this street was opened, the municipality assumed to acquire, the title of the New York and Harlem Railroad Company to the property which it owned in Fourth avenue, awarding it therefore the nominal sum of one dollar upon each lot. At that time, however, the municipal authorities and the legislature recognized the right of the railroad company to continue its road in the street and in no way disturbed its possession or the exercise of that right. It is claimed that by this proceeding the city became vested with the title to the property of the railroad company, and, hence, that the deed from Mrs. McGown to the New York and Harlem Railroad Company was abrogated and its effect wholly annulled. This contention cannot be maintained. If it be admitted that the naked title to the land passed to the city, it is still clear that the consent of Mrs. McGown to the construction and operation of this road did not pass with it. That grant was at least an irrevocable consent to the use of the land for a specific purpose, which continued and remained in the corporation to which it was made. But if, as claimed, it passed to the city, so that the city had the right formerly possessed by the railroad company, then it is equally clear that the right still exists, and as the city has consented to the use of the street, Mrs McGown and her subsequent grantee are yet bound by that grant. When the street was opened in 1853, the railroad was upon a high viaduct along the center of the avenue which was in the sole and exclusive possession of the railroad, and no portion of it was occupied as a public street. Therefore, whatever rights the city may have acquired, it is quite evident that, so far as Mrs. Gown was concerned, the right which she had granted to the railroad company never revested in her, and, consequently, neither she or her grantees can assert the right thus released.

In 1872 the legislature passed an act adopting (487) a plan for the improvement of Fourth avenue. By that act the railroad corporation was authorized and required to regulate the grade of its road, and authorized to lay two additional tracks for the accommodation of traffic and to facilitate rapid transit in the city. By the same act the officers of the municipality were forbidden to obstruct the improvement or use of Fourth avenue for that purpose. Therefore, not only the municipality consented to the improvement made in pursuance of that statute, but the legislature expressly authorized the use of the avenue for that purpose and to the width of the present structure, so that, unless the plaintiff has some right in the street which is superior to that of the defendants and to the combined power of the legislature and municipality, this action cannot be maintained.

It is manifest that the only injury the plaintiff has sustained resulted from the proper use and operation of the defendants' steam railway; and as the plaintiff's grantor expressly conveyed to the defendants the right to maintain and operate it there, the plaintiff cannot recover for any injuries arising from that cause. The defendants' use of the street for the purpose of building, maintaining and opening its railroad was a legal one. It was constructed and is maintained and operated under and by virtue of the grant by Mrs. McGown and the combined authority of the legislature and municipality. "The Legislature, by virtue of its general control over public streets and highways, has power to authorize structures in the streets which, without such authority and under the common law, would be held to be incroachments or obstructions, and this power it may delegate to the governing body of a municipal corporation." (*Wormser* v. *Brown*, 149 N. Y. 163, 171.) As the appropriation of this street by the defendant for the purpose of constructing and maintaining its road was legal, no merely consequencial damage to the owner of an adjoining lot, having no title to the street, furnishes a ground of action against the defendant. (*Forbes* v. *R.*,

W. & O. R. R. Co., 121 N. Y. 505, 518.) Where a railroad is built in a public street or highway with
(488) proper care and skill, after the public rights and private property, if any, in the highway or soil have been acquired, the railroad is not responsible for any damages to private property necessarily resulting from its construction and operation. (*Uline* v. *N. Y. C. & H. R. R. R. Co.*, 101 N. Y. 98; *Conklin* v. *N. Y., O. & W. R. R. Co.*, 102 N. Y. 112.)

The cases of *Reining* v. *N. Y., L. & W. R. R. Co.* (128 N. Y. 157) and *Egerer* v. *N. Y. C. & H. R. R. R. Co.* (130 N. Y. 108) in no way impair the doctrine of the *Uline* and *Conklin* cases. Nor are they applicable to the facts in this case. In those cases it was held that the authorities of a city have no right to substantially close a street for ordinary street uses against an abutting owner, and that before an established street can be closed against such owner he would be entitled to compensation. In the case at bar the street at the place where the defendants' railroad was constructed was never opened or used as a public street of the city. The streets in Fourth avenue were, by the command of the statute, laid out upon either side of the railroad structure, and were the only streets ever actually opened in that avenue. So that the plaintiff never acquired or possessed any right to the use of Fourth avenue as a public street, except such as she now enjoys.

This case is clearly distinguishable from the elevated railroad cases upon which the plaintiff relies. In those cases there was no grant by the abutting owners of the right to use the street for the purposes for which it was used, and the appropriation of the street was held to be illegal, while here the use of the street was legalized by a grant from the plaintiff's grantor, as well as by the legislature and municipal authorities. We are of the opinion that the grant to the New York and Harlem Railroad Company by the plaintiff's grantor is a substantial bar to the plaintiff's claim in this action. It is no answer to this position that the city subsequently, for a nominal consideration, obtained by condemnation the naked fee

to the twenty-four feet of land deeded by Mrs. McGown to the New York and Harlem Railroad Company. In whomsoever the mere naked title to the twenty-
(489) four feet may rest, it is obvious, from the record, that the right to maintain and operate the defendants' road, with the consent of the plaintiffs' grantor, was not intended to be affected, but to remain in the defendants as a protecton to their right, so long as the road was operated in that avenue and the time mentioned in the grant had not expired.

Under these circumstances, we agree with the learned trial court that neither Mrs. McGown nor her grantees, immediate or remote, can properly ask a court of equity to enjoin the operation of the defendants' railroad, to which her assent was thus expressly given. In *American Bank Note Co.* v. *N. Y. E. R. Co.* (129 N. Y., 252) this court held that where a public use authorized by law takes no land of an individual, but merely affects him by his proximity, the necessary annoyances of that use furnish no basis for damage. It was there expressly decided that noise was not an injury for which damage might be recovered, and that in that class of cases the abutter could recover only the damages to his easements of light, air and access. In *Wormser* v. *Brown* (149 N. Y. 163) this court determined that an interference with the view from the plaintiff's windows would not entitle them to relief by injunction, and that the granting or refusal of equitable relief by way of injunction depends to a great extent upon the particular facts in each case, and is largely discretionary with the court in which the action originated. *In People ex rel. N. Y. & H. R. R.* v. *Commissioners of Taxes* (101 N. Y. 322) the judgment of this court was to the effect that the tunnels, tracks, superstructures, substructures, stations, viaducts and masonry of the defendants situated upon this avenue were land, within the meaning of the statute in reference to property liable to taxation, and that the fact that the city was required to pay a portion of the expense of the construction of the viaduct in question did not divest it of the incidents of other property belonging to the railroad company, or give the city any title to it, especially in view of the fact that the city was

forbidden to obstruct the improvement or the use of Fourth avenue above Forty-second street for that purpose. Under the circumstances of this case, it is
(490) manifest that the abutting owners who derived their title from Mrs. McGown subsequent to her grant to the New York and Harlem Railroad Company were not entitled to have that portion of the avenue upon which the defendants' viaduct stands open as a part of the public street, but that the only streets for public use which existed in Fourth avenue, or to the use of which they were entitled, were streets forty-two feet in width upon each side of the viaduct occupied by the defendants.

The plaintiff, however, contends that the increase in width of the viaduct from twenty-six to fifty-six feet was an additional burden upon the plaintiff's land, and therefore, to the extent of such increase, the acts of the legislature and municipal authorities were unauthorized and the defendants' use of the street was an invasion of her rights as an abutting owner. Inasmuch as the trial court has properly refused to find that the plaintiff's easements of light, air and access were invaded or impaired, except by such acts and conditions as were incident to the operation of a steam railroad, to which her grantor consented, we think there was no such added burden as would justify this court in holding as a matter of law that the trial court should have awarded her relief by injunction. While the additional traffic over the defendants' road, resulting from an increased population and an enlarged business, may have added to the number of trains passing the plaintiff's premises, still, as it does not appear that the same number of trains might not have passed and the same traffic might not have been conducted upon the two previously existing tracks, and have been equally annoying and burdensome to the plaintiff's property, and as the consent of Mrs. McGown was unlimited in that respect, it would be difficult to determine the extent of any such added injury, if it exists, or to hold that it was not within the intention of the parties and covered by her grant.

Moreover, when the plaintiff purchased her premises,

the defendants' viaduct had existed for many years, had occupied the entire portion of the street where it
(491) now stands, and was used substantially as when this action was commenced. She purchased the premises with full knowledge of its existence, of its purpose and use, and with constructive notice of the defendants' rights. With that knowledge, presumably, she made the purchase for a price which included all proper deductions from its value by reason of the presence of the defendants' railroad, and, hence, lost nothing by being deprived of any of her otherwise appurtenant easements.

Under these circumstances we are of the opinion that the learned trial court was justified in declining to award to the plaintiff the relief demanded, and that this court cannot hold as a matter of law that the discretion of the court below was improperly exercised.

We have examined the various exceptions of the plaintiff relating to the reception and rejection of evidence, to the findings of the court and to the refusal of the court to find as requested, without discovering any that would authorize a reversal of the judgment or that requires further discussion.

The judgment should be affirmed, with costs.

All concur, except PARKER, *Ch. J.*, not sitting.

Judgment affirmed.

OPINION IN THE LEWIS CASE, THE LEADING CASE IN THE COURT OF APPEALS ON THIS SUBJECT.

Court of Appeals.

MARY J. LEWIS, Appellant and Respondent,
against
THE NEW YORK AND HARLEM RAILROAD, Company, *et al.*, Respondents and Appellants,
Impleaded with the NEW YORK, NEW HAVEN AND HARTFORD RAILROAD Company, Defendant.
} 162 N. Y., 202.

Argued January, 1900; decided February, 1900.

(218) VANN, *J.*: The plaintiff claims that the trial court erred in refusing to allow her damages for the effect of the new structures, both temporary and permanent, without considering the effect of the old structure. The defendants claim that the court erred in awarding any damages, or giving any relief whatever, to the plaintiff, because, as against her, they had the right to erect any railroad structure in the street, of any height, within the lateral lines of the old embankment.

The defendants' appeal rests mainly upon the proposition that, by virtue of the Benson deed to the
(219) Harlem Company, in 1832, and possession thereunder for more than twenty years under claim of title exclusive of any other right, the defendants acquired title to the land upon which the steel viaduct now stands. (Code Civ. Pro., Sec. 369; *Baker* v. *Oakwood*, 123 N. Y., 16.)

The situation, when the Harlem Company entered Fourth avenue and took possession of the strip of twenty-four feet covered by the Benson deed, was as follows: The section had been mapped under the act of 1807, as well as by Benson, and Fourth avenue had been laid down

on both maps as one of the streets of the city. Benson had conveyed the entire avenue to the city for street purposes reserving certain rights, and after thus conveying to the city had assumed to convey said strip to the Harlem Company exclusively for railroad purposes, but the conveyance was effective only as to his reserved rights. After conveying to the city, but before conveying to the company, he had conveyed, by reference to said maps, certain abutting lands to the plaintiff's predecessor in title. The avenue was not opened or built upon, as such, but was a street on paper only. The state and city had given the Harlem road the right to enter the avenue and lay down tracks on said strip, subject to certain drastic conditions, which gave the city supreme control, and to which the company had expressly assented, and, finally, the city had authorized the company " to take possession of the ground owned by the " former and had ordered the latter to construct its road thereon, with leave to use the street for " the purpose of a railroad and for that purpose only." The situation differs from that considered by us in a late case, as Benson had conveyed the street to the city and the abutting land to plaintiff's predecessor before he conveyed to the company, whereas in that case the first conveyance was to the company, itself. (*Conabeer* v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y., 474.)

There is no evidence as to the character of the original entry into the street by the Harlem Company, or
(220) the nature of its claim when or after entering, except as it may be inferred from the facts above mentioned and the subsequent occupation and use for railroad purposes of a portion of the avenue, which was a street *in posse* only and did not become a street *in esse* until twenty years later. Under these circumstances the entry and occupation by the company must be "deemed to have been under and in subordination to the legal title" of the city. (Code Civ. Pro., Sec. 368; Code Pro., Sec. 81; 2 R. S., 293, Sec. 8.) Occupation must not only be hostile in its inception, but it must continue hostile, and at all times, during the required period of twenty

years, challenge the right of the true owner in order to found title by adverse possession upon it. The entry must be strictly adverse to the title of the rightful owner, for if the first possession is by permission it is presumed to so continue until the contrary appears. If the occupation begins with recognition of the real owner's estate it is presumed to be subservient, and that the one making the entry intends to hold honestly and not tortiously. The character of the possession depends on the intention with which entry is made and occupation continued. There is no *disseisin* until there is occupation with intention to claim title, and the fact of entry and the *quo animo* fix the character of the possession. The burden of proving all the facts necessary to constitute adverse possession is upon the one who asserts it, for in the absence of such proof possession is presumed to be in subordination to the true title. (*Brandt* v. *Ogden*, 1 Johns., 156; *Smith* v. *Burtis*, 6 Johns., 197; *Jackson* v. *Johnson*, 5 Cow., 74; *Jackson* v. *Brink*, 5 Cow., 483; *La Frombois* v. *Jackson*, 8 Cow., 589; *Humbert* v. *Rector, etc., of Trinity Church*, 24 Wend., 587; *St. Vincent Female Orphan Asylum* v. *City of Troy*, 76 N. Y., 108; *Doherty* v. *Matsell*, 119 N. Y., 646; *Kneller* v. *Lang*, 137 N. Y., 589; *DeLancey* v. *Piepgras*, 138 N. Y., 26; *Heller* v. *Cohen*, 154 N. Y., 299, 311; Tyler on Ejectment, 860; Buswell's Lim. & Ad. Poss., 380; Am. & Eng. Encyc. of Law (2nd ed.), 778.)

The entry by the Harlem Company was by the express permission of the city, under a resolution which
(221) recited that the land entered upon was at the time owned by the city. The occupation was permissive from the outset, and as there is no adequate evidence to the contrary, is presumed to have so continued ever since. The company recognized the title of the city by assenting to resolutions passed by the common council both before and after it accepted the deed from Benson. There was no open or notorious assertion of title under that deed, and no evidence of intention to claim title thereunder, except the deed itself, which was not recorded until after the railroad was built. There is no

evidence that the city had notice, either actual or constructive, of that deed until the condemnation proceedings of 1850, when a nominal award was made to the company for its interest in the fee of the street. By an agreement duly executed under its seal, the company expressly covenanted that if permitted to occupy Fourth avenue, it would remove its railroad from the street wherever the city required it. It entered under a license and remained under a license. Its unbroken continuity of possession from that day to this has never been accompanied with the assertion of any claim hostile to the city, for its deed from Benson, under the circumstances, is no evidence of a hostile claim, but simply that it had acquired Benson's reserved rights, which cut no figure in this controversy. Possession to be effective must be hostile to the rightful owner, and if the company intended to base a claim upon a deed in hostility to the city, the circumstances required it to make the fact known to the city, as otherwise its possession is presumed to be in accordance with its agreement. (*Treadwell* v. *Inslee*, 120 N. Y., 458.) The city did not know that the company had repudiated its agreement and stood on the Benson deed, exclusive of any other right, if such were the fact. It did not know of the existence of that deed, for the record was no notice, as a land owner is not compelled by the Recording Act to watch the records for conveyances of his own property.

(222) To authorize the presumption of a grant, the enjoyment " must not only be uninterrupted for the period of twenty years, but it must be adverse, not by leave or favor, but under a claim or assertion of right, and it must be with the knowledge and acquiescence of the owner." (*Flora* v. *Carbean*, 38 N. Y., 111; *Bedlow* v. *N. Y. F. Dry Dock Co.*, 112 N. Y., 263; *Parker* v. *Foote*, 19 Wend., 313.) When the occupant is in possession under two instruments, one subservient and the other hostile to the true owner, such possession, in the absence of positive notice to the contrary, will be regarded as subservient only, for the law raises a presumption in favor of an honest and against a dishonest purpose. This disposes of the appeal brought by the de-

fendant, so far as it requires discussion apart from the claim of the plaintiff.

The plaintiff's appeal rests upon the proposition that she is entitled to the same relief that she would have been if there had been no railroad structure in the street prior to the erection of the steel viaduct. It would be sufficient to say in answer to this claim that as she asks aid from a court of equity, she can enforce her claim only so far as it is equitable, in the sense of being just. When she crosses the line of equity and good conscience to ask for compensation on the same basis as if Park avenue had never been a railroad street and seeks to recover damages which she has not suffered, on the ground of an alleged technical right, she must withdraw from a court of equity and seek relief at law. Since she or her predecessors submitted without complaint or question to the erection of two railroad structures in front of her property, each of which stood there for more than twenty years and wholly occupied the central portion of the street to the exclusion of all traffic therefrom, it would not be just to claim the same damages for injury to her easements by the third structure that she could properly have claimed if those easements had not been impaired by the previous structures. She has been awarded all that is equitably her due, which is the net difference, measured in money, between the effect of the old and the new structure while in actual use, less the benefits conferred by the latter. She has also been granted an injunction to protect her hereafter, unless her permanent damages are
(223) paid upon the same basis. A court of equity will give her no further relief.

But we will not stop here, for we wish to place our decision upon grounds equally tenable in either jurisdiction. While the defendants acquire no right by adverse possession, as against the city, they acquire certain rights by prescription as against the abutting owner.

The leading facts bearing upon the subject may be summarized as follows: The lands embraced within the lines of Fourth avenue, as originally laid out upon the maps of the city and of Benson, were, by various conveyances,

resolutions of the common council and acts of the legislature, so devoted to street purposes that they could not lawfully be used for any inconsistent purpose. (*Matter of Vil. of Olean* v. *Steyner*, 135, N. Y., 341, 345; *Lord* v. *Atkins*, 138 N. Y., 184, 191; *Haight* v. *Littlefield*, 147 N. Y., 338, 342.) The easements of light, air and access, so far as they had any practical existence prior to 1853 when the avenue was opened, were encroached upon by the first railroad structure, which, in front of plaintiff's premises, was a solid embankment 28 feet wide at the bottom and 10 or 12 feet high, walled in with stone. From 1853 until 1873, when the first improvement required by statute was made, the avenue was open and used as a street on either side of the railroad structure in the center, which continued to encroach upon the easements of the abutting owners. From 1873, when the embankment was converted into a viaduct 56 feet wide and 7 feet high in front of the *locus in quo* until 1894, when the last improvement required by statute was begun, the same encroachment continued. As to the plaintiff and her grantors there was an open, continuous and exclusive possession and enjoyment by the railroad company of the easements in question to the extent of the user during the periods named.

Prescription rests upon the presumption of a lost deed, after adverse use and enjoyment for twenty years, which has been adopted by the courts as the prescriptive period from analogy to the Statute of Limitations.
(224) (*Woodruff v. Paddock*, 130 N. Y., 618, 624; *Snell v. Levitt*, 110 N. Y. 595; *Nicholls v. Wentworth*, 100 N. Y. 455; *Ward v. Warren*, 82 N. Y. 265; *Parker v. Foote*, 19 Wend. 309, 312; Goddard on Easements, 90; Washburn on Easements [4th ed.] 123; 19 Am. & Eng. Encyc. of Law, 7; Jones on Easements, Sec. 160; Gerard on Titles, 745.) What the primary owner loses by his *laches* the other party gains by continued possession without question of his right. (*Campbell v. Holt*, 115, U. S. 620, 623.) The adverse use must be of the same character and duration as the adverse possession required to give title to real estate, which has already been consid-

ered. If the presumption as to a lost deed may be rebutted, still it presents a question of fact which, in this case, has been determined in favor of the defendants. The possession of the defendants was not subordinate to the plaintiff's title, nor permissive as to her, but openly hostile and necessarily known to be such, to her and her grantors, who made no objection until 1897. It was exclusive, definite and uninterrupted, for it absolutely excluded all from the part of the avenue occupied by the railroad structures. The obstruction was not out of view or knowledge, but in plain sight of the abutting owners, who, by making no objection, acquiesced in the situation. The question does not arise between the railroads and the city, which had consented in advance to the occupation, but between the railroads and the abutting owners, who had not so consented.

Under these circumstances the old structures had stood in the street so long that the railroads acquired a prescriptive right to have them stand there forever, so far as the plaintiff is concerned. The situation was the same in effect as if one of her grantors, while he owned her property, had conveyed to the defendants the right to permanently keep the stone viaduct where it stood and to use it indefinitely for railroad purposes. To the extent of the user by the companies the plaintiff, through the acquiescence of herself and her grantors, had parted with her rights when the present structure was erected. She could claim no damages on account of the old structure, so long as it stood there. She could claim no dam-
(225) ages on account of any new structure erected in the same place within the same lines, and for the same purpose, which inflicted no more injury upon her property than the old. She could raise no question except such as she could have raised had she given a deed expressly assenting to the erection of the old structure. (*Conabeer Case, supra.*) Had the new structure been no higher than the old, in front of her property, none of her rights would have been invaded, and she would have been entitled to no relief. These views are not inconsistent with but are in accordance with the principles of a case relied upon by the plaintiffs, where the defense of prescriptive

right failed because the facts failed, as adverse user was not found to have existed for the requisite period. (*American Bank Note Co. v. N. Y. El. R. R. Co.*, 129 N. Y. 252.)

The reason why possession of the same structure was adverse to the plaintiff but not to the city, is that the former never consented to the occupation, except by acquiescence during the prescriptive period, while the latter consented to the occupation in advance, and renewed the consent by subsequent acts at frequent intervals, while the railroad company never gave notice, direct or indirect, that it claimed to occupy under its deed or otherwise than by the consent of the true owner.

Prescriptive rights, however, are measured by the user, and the defendants could make no further encroachment without liability. (*Prentice v. Geiger*, 74 N. Y. 341; *Baldwin v. Calkins*, 10 Wend. 169; *Bealey v. Shaw*, 6 East, 208; *Styles v. Hooker*, 7 Cow. 266.) As was said by Judge Andrews in *Prentice v. Geiger* (*supra*): "The right is supposed to have had its origin in a grant, and the grant being lost, the user is the only evidence of the right granted, and as the presumption of a grant only exists where there has been an adverse, continuous and uninterrupted, user according to the nature of the easement claimed, for the period of twenty years, the prescriptive right is confined to the right as exercised for that period of time." The plaintiff, therefore,
(226) was entitled to recover for the additional injury to her propery so far as it was caused by the defendants.

We now reach the question whether the defendants were liable for any part of the damages caused by the effect of the steel viaduct while it was in process of construction.

That structure was not erected by the defendants but by the state, as appears from the facts already stated. South of 125th street it gave them no facilities which they did not have before. The stone structure of 1872 did away with grade crossings and gave them four tracks, and this is all they have now. The change

of grade north of 125th street, in order to cross the Harlem river at the height required by the general government, has no bearing upon the change of grade south of that point. The defendants are liable for what they did, but not for what the state did. (*Atwater* v. *Trustees, etc.*, 124 N. Y. 602.) The state created a board of experts and required them to make the improvement for the benefit of the public, giving them absolute control with no right on the part of the defendants to let or hinder. The board made the plans and did the work, letting their own contracts, employing and discharging their own men, without supervision or interference by the companies, which did not and could not set the board in motion, for the want of power, if for no other reason. The change of grade in front of the plaintiff's premises was not only for a public purpose, but was wholly in the interest of the public and not for the benefit of the defendants who had no power to prevent it. They simply paid one-half of the expense by command of the statute, and, hence, under compulsion of law. They are not liable for the acts of the Park avenue board, which was not their agent, but a governmental agency of the state. (*Benner* v. *Atlantic Dredging Co.*, 134 N. Y., 156, and cases cited on page 162.) Their offer in advance to obey the statute did not effect its compulsive force, for obedience was their duty. As was tersely said in a late case, the railroad company "had no choice left to it. The state intervened and directed that a work, which it had the power to require to be done, (227) should be done, not by the railroad nor even by the city, but by an independent board in the creation of which the defendant had no voice, over whose selection of employees it had no control, with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent." (*N. Y., N. H. & H. R. R.* v. *Baker*, 98 Fed. Rep. 694.)

When the work was completed, if the defendants had not used it, they clearly would have been under no liability to the plaintiff. This is a decisive test, not only as to the permanent structure, but also as to the tem-

porary trestles, which were a part of the same scheme of the legislature, acting under general power, as well as that reserved when it incorporated the Harlem Company. They were erected by the same board, in the same way and under the same authority, but for the double purpose of aiding in the principal work of the state, and at the same time affording temporary relief to the defendants in the operation of their trains. The statute "authorized and directed" the defendants to operate their trains on the structures "when completed." Accordingly, they laid their tracks, at first on the trestle work, which they used for a short time, and then on the steel viaduct, which they have used ever since. In thus using the work of the state they doubtless accepted it as their own, but they accepted it as a completed structure, and did not thereby become parties to the process of construction. Their acceptance did not reach back and adopt the previous acts of the state, but the effect was the same as if they had purchased it from the state on the day they commenced to use it.

Thus we strike the time when the liability of the defendants began. When they commenced to use the steel viaduct they started a new trespass on the rights of the abutting owners. While they had a prescriptive right to use a railroad structure standing in the same place and of the same height as the stone viaduct, which was about 7 feet, they had no right, as against the plaintiff, to use the steel viaduct, which reached upward 35 feet until it was on a level with the windows of her fourth story. The new structure, so far as it stood within
(228) the lines of the old, was not a trespass, for it lessened instead of adding to the burden, but so far as it extended above the space which it had to occupy, it was a trespass, for which the defendants have properly been held liable during the time they used it. The trestle work, which stood wholly without the lines of the stone viaduct, was a trespass without mitigation, for it substantially closed the avenue and conferred no benefit whatever upon the adjacent property. As to that structure, the liability of the defendants was absolute during the period of user.

The permanent structure, however, was not an unmitigated trespass, for upon the surface of the street it was a great improvement upon the stone viaduct, which it displaced. Before the change was made Park avenue was virtually two streets, each 42 feet wide, separated by a solid and impassable embankment 56 feet in width. Now it is 140 feet wide, with no obstruction to traffic except the columns which support the elevated roadbed. Never before could the plaintiff, or her predecessors, cross the street in front of her property, or even cross by the nearest lateral streets. For the first time in the history of the avenue its central portion is open, paved and capable of being used as a street. A substantial benefit was thus conferred, which, in assessing the damages inflicted upon the owner's easements, when no part of his land is taken, should in justice and according to authority be regarded. The basis of assessment is the difference in value of the easements as they now are and as they were with the old, and before the new viaduct was erected. (*Newman* v. *M. E. Ry. Co.*, 118 N. Y. 618, 624; *Bohn* v. *M. E. Ry. Co.*, 129 N. Y. 576, 591; *Sutro* v. *M. Ry. Co.*, 137 N. Y. 593; *Bischoff* v. *N. Y. El. R. R. Co.*, 138 N. Y. 257.) The courts below followed this rule and held the defendants liable for the net difference only.

The claim that the defendants abandoned their prescriptive rights by removing the old structure cannot be sustained. The old structure was not removed by the defendants, but by the state, of its own motion
(229) and through an independent agency created by itself. Moreover, the removal of one railroad structure, followed immediately by the erection of another, in the same place and for the same purpose, is no evidence of an intent to abandon the prescriptive right to have a railroad structure in the street. If the new structure had not been a greater burden than the old the plaintiff would have been entitled to no relief whatever.

The effect of the condemnation proceedings of 1850, which widened the avenue, created no new easements for the benefit of the plaintiff or her predecessors, so far as

the original width of the avenue was concerned. This was passed upon in the *Conabeer Case* (*supra*), and requires no discussion.

We have reached the conclusion that the learned trial judge awarded and withheld relief precisely as the law requires, and that his judgment should stand. In reaching this conclusion we have been materially aided by the opinions delivered in the Supreme Court in this and other cases affecting the locality in question, although we have not adopted all of the grounds upon which that learned court proceeded to judgment. (*Taylor* v. *N. Y. & H. R.R. Co.*, 27 App. Div. 190; *Welde* v. *N. Y. & H. R.R. Co.*, 28 App. Div. 379, and 29 Misc. Rep. 13; *Birrell* v. *N. Y. & H. R.R. Co.*, 41 App. Div. 506; *Sander* v. *N. Y. & H. R.R. Co.*, 42 App. Div. 618.)

We have decided the case before us and have not tried to decide other cases, which, although arising in the same section, rest upon different facts, and may be controlled by different principles of law. While we have carefully read the argument presented by learned counsel in behalf of the intervenors, we have limited its effect, so far as we have followed it, to the facts of this case.

The judgment should be affirmed, but as both parties appealed, without costs to either as against the other.

Parker, *Ch. J.*, Bartlett, Martin, Cullen and Werner, *JJ.*, concur; Gray, *J.*, not sitting.

Judgment affirmed.

OPINION IN THE FRIES CASE, WHERE THE LEWIS CASE WAS LIMITED.

Court of Appeals.

GUSTAV R. FRIES, Respondent,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Apellants.
} 169 N. Y., 270.

Argued April, 1901; Decided December, 1901.

O'BRIEN, *J.*:

The plaintiff is the owner of a three-story frame
(273) building on Park avenue, at the southwest corner of 129th street, in the city of New York. The building contains eight stores fronting on the avenue. This avenue is one hundred and forty feet wide, and the defendants own and maintain a railroad therein, and have under some form and under some arrangement for over sixty years. The plaintiff claims that the railroad has invaded his property rights and is a trespasser upon them. For this trespass the trial court held that the defendants should pay to the plaintiff the sum of five thousand five hundred dollars, past and future damages, or, in default of such payment, be perpetually enjoined from operating the railroad. This appeal involves an inquiry into the principles upon which the judgment is founded. There is considerable discussion upon the briefs of counsel who have argued the case concerning the effect of a deed to the railroad by the former owner of the plaintiff's property and many other details relating to the right of the railroad to construct and maintain the same in the street in front of the premises in question.

I cannot perceive how these questions can be of
(274) much consequence in the disposition of this appeal, since the trial court made an express finding that under this deed various resolutions and acts of the city authorities at various times and under certain stat-

utes referred to, and by lapse of time and the acquiescence of the plaintiff and his predecessors in title, the defendants " acquired the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897, as hereinbefore described." Here we have an express finding that on and prior to the date named the defendants were entitled to have and maintain their railroad in the street in question as against the plaintiff and all the world, without let or hindrance from any one, and surely there could be no trespass upon the plaintiff's rights prior to that date. The trial court also found how the railroad had been maintained and operated on and prior to the date mentioned as follows: "The said railroad prior to February 16th, 1897, was operated along the center of said Park Avenue in front of the plaintiff's premises in a depressed cut about fourteen feet below the surface of said Park Avenue and sixty-one feet and eight inches wide, which said railroad cut was bounded on each side by parapet walls of about two feet six inches above the surface of said avenue, which said embankment or viaduct cut off access from one side of said avenue to the other, except at the intersection of 128th and 129th street, at which points there were bridges for vehicles and foot passengers across the said railroad cut." According to this finding the defendants had the right to maintain a railroad in front of the plaintiff's premises that practically cut him off from access to the opposite side of the street except by means of bridges located at intersecting streets. The court also found that subsequent to the date mentioned the manner of operating the railroad was changed, and this is the finding on that subject: " That subsequent to the passage of Chapter 339 of the Laws of 1892, there was commenced within the lines of Park Avenue and in the center thereof the construction of a new viaduct of iron and steel, said structure being about twenty feet high above the surface of Park Avenue and about fifty-

(275) nine feet wide. Said work was done under the supervision of the Board for Park Avenue im-

provement above 106th street, and the said structure was completed and accepted by the defendants on February 16, 1897. That neither of defendants are liable for any fee or rental damage which may have been sustained prior to that date; that said permanent structure and the operation of trains thereon are, and since February 16th, 1897, have been a continous trespass upon plaintiff's easement of light and air appurtenant to his said premises, and solely in consequence of said trespass and aside from any other causes the rental value of said premises was depreciated from said date down to April 2d, 1900, the date of trial, in the sum of $1,500."

It will be seen that the trial court held that the present viaduct and the operation of trains thereon, are, and since the date mentioned, have been, a continuous trespass upon plaintiff's easements of light and air appurtenant to his premises. It also found that this structure was built and the trains operated thereon under and in pursuance of the provisions of chapter 339 of the Laws of 1892. An examination of that statute discloses very clearly a comprehensive scheme on the part of the state for the improvement of Park avenue as a public street by removing the railroad tracks from the cut, closing up the cut and then regulating, grading and paving the street. It was a legislative scheme for the accomplishment of a public improvement. The railroad company had nothing to do with it except to pay such assessment as was imposed upon it by the public authorities to defray the expense of the improvement. Whatever changes were made in the street and in the operation of the railroad were made not by the defendant but by the state in virtue of its general power to improve and regulate public streets. The defendant could not resist the improvement if it would, nor could it refuse when the viaduct was constructed to operate its trains upon it, even if it wanted to, without subjecting itself to a sentence of death at the hands of the state, as all corporations do that refuse to discharge the duties or perform the functions for which they have been created. There is no find-

ing and no claim that the removal of the tracks from the depressed cut to the elevated viaduct was the act
(276) of the defendant. On reading the statute it will be seen that it was an act of the state, and how the defendant in one day became a trespasser upon the plaintiff's property rights it is very difficult to conceive. Another case growing out of this improvement was recently before this court (*Welde* v. *N. Y. & Harlem R. R. Co.*, 168 N. Y. 597), in which the effect of this statute was pointed out. If the viaduct was lawfully constructed and existed in the street under the authority of law, it is impossible to conceive how the defendant could be guilty of a trespass in the operation of its trains upon it. It was constructed for that purpose and the defendant was obliged to use it in the exercise of its franchise and the discharge of the duties due to the public.

The state resolved to displace the railroad in the depressed cut in order to fill up the cut, regulate, pave and grade the whole street, and to this end commanded the railroad to run its cars upon tracks placed upon a viaduct constructed by the state under the statute, and the railroad obeyed. If in doing so it became a trespasser, it must be because the legislation providing for the change violated some property right of the plaintiff which is protected by the Constitution. In other words, it must be because the statute under which the change was made is unconstitutional. I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was but a consequence of the improvement for which the railroad was not responsible. The law is well settled in this state that where the property of an abutting owner is damaged, or even his easements interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases, it is

held to be *damnum absque injuria*. (*Radcliff's*
(277) *Executors* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Talbot* v. *N. Y. & H. R. R. Co.*, 151 id. 155; *Folmsbee* v. *City of Amsterdam*, 142 id. 118; *Rauenstein* v. *N. Y., L. & W. Ry. Co.*, 136 id. 528; *Atwater* v. *Trustees, Vil., Canandaigua*, 124 id. 602; *Benner* v. *Atlantic Dredging Co.*, 134 id. 156.)

The change from the manner of operating the railroad in the depressed cut to an elevated viaduct was made in precise conformity to the mandate of an express statute, and hence even if the railroad made the change itself instead of the state, it would not be liable to the plaintiff. (*Hill* v. *Mayor, etc., of N. Y.*, 139 N. Y. 495; *Bohan* v. *Port Jervis G. L. Co.*, 122 N. Y. 18; *Cogswell* v. *N. Y., N. H. & H. R. R. Co.*, 103 id. 10; *Morton* v. *Mayor, etc., of N. Y.*, 140 id. 212; *D., L. & W. R. R. Co.*, v. *City of Buffalo*, 158 id. 266; Id. 478; *Hill* v. *Managers of Met. Asylum Dis.*, L. R. [4 Q. B. Div.] 433; *S. C.* on appeal, 6 App. Cas. 193; *Truman* v. *London, B. & S. C. R'way Co.*, L. R. [25 Ch. Div.] 423). The railroad originally covered nearly 62 feet of the street surface. Now the elevated structure covers only 59 feet above the surface. It would seem to be impossible to sustain the judgment in this case without assailing the constitutional validity of the statute under which this change was made, but I think it would be difficult, in view of the authorities cited, to state any ground upon which it can be questioned. But if this were otherwise it is clear that the plaintiff upon the present record is in no condition to raise any such question. He has not raised it in any form in any court, and it cannot be raised for him now as this court has recently held. (*Dodge* v. *Cornelius*, 168 N. Y. 242.) The plaintiff has not only refused to raise any question concerning the validity of the statute in this or any other court, but has actually affirmed its validity by setting it out in his complaint and basing his action upon it. So we have the case of a change in the grade of a street which necessitated a change in the location of the railroad tracks, all made under a valid statute, and that alone is said
(278) to constitute the alleged trespass. The plaintiff's claim would seem to be answered by the

principle laid down in the *Rauenstein* case, the other cases first cited, and in *Ottenot* v. *N. Y., L. & W. Ry. Co.* (119 N. Y. 603.) The judgment in this case rests upon what may be called, for want of a better expression, a legal paradox. All that was done that in any way affects the plaintiff's property rights was done, not by the defendant, but by the state. The state engaged in the municipal duty of improving a street in which there was the right to maintain a railroad. It constructed a viaduct in order that the railroad might be operated upon it, and the railroad obeyed. This court has held that the railroad could not resist, which means, of course, that the legislation was valid. (*Lewis* v. *N. Y. & H. R. R. Co.*, 162 N. Y. 226.) On the 15th of February 1897, it was found that the defendant was rightfully and lawfully operating its railroad in this public street. The next day, as has been decided, it became a trespasser, not only in running trains upon the viaduct, but by maintaining it in the street. It would seem to follow from this that while the state had power to do everything that was done and to compel the railroad to be operated upon the viaduct, yet the railroad was guilty of a trespass in doing so; that is to say, the state compelled the railroad to commit a trespass and the railroad must be held liable for everything done by the state in the exercise of its supreme authority. The conclusion of the learned trial judge seems to me to involve this method of reasoning, and it would seem that a result which in its last analysis depends upon such arguments must necessarily be unsound.

The elevated railroad cases in this court proceed upon the principle that, as against abutting owners, the railroad was unlawfully in the street, as they had not consented to the construction or conveyed the right to interfere with their easements. But in the case at bar we have an express finding that the defendant had acquired the right as against the plaintiff to use the street for the operation of the railroad. Hence, the principles upon which that mass of litigation proceeded have no
(279) application to this case, and so this court has held. (*Conabeer* v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 474.)

On reading the opnions in the court below, both at the trial and on appeal, it will be seen that no reason has been given for the judgment, except that it was supposed to be required by something decided by this court in *Lewis* v. *N. Y. & H. R. R. Co.* (162 N. Y., 202). I do not think that anything was presented, discussed or decided in that case that warrants the judgment in the case at bar. In the first case, the learned judge who gave the opinion in that case was careful to say at its conclusion: "We have decided the case before us, and have not tried to decide other cases, which, although arising in the same section, rest upon different facts and may be controlled by different principles of law." This case does rest upon different facts, comes here in a very different way and is governed by different legal principles, and so is within the saving clause of the opinion. (1) In the first place the legal questions here mentioned were not presented, argued or discussed at all in that case. (2) In that case both parties appealed from a small judgment and, hence, neither party was bound by the findings, except so far as there was evidence to support them. The evidence in support of the findings was, therefore, open for discussion here, and it will be seen from the report of the case that the discussion proceeded not so much upon the facts found as upon the proofs given, the decision below not being unanimous. The question of title in the railroad and of adverse possession were the principal matters discussed. Here we are relieved from all discussion of the evidence, since we have specific findings that the plaintiff does not question by appeal or otherwise, and that conclude the defendant as to the facts, and so we have a situation entirely different. (3) It was not found in that case that the railroad was lawfully in the street on the day that the present viaduct was completed, but only that it was lawfully in the street at an earlier date by three years. In the meantime it seems that it was shown in that case that the railroad was using an old viaduct constructed of stone, so far as it appears
(280) upon its own authority, while in this case no disturbing element of that kind intervenes, and hence we have to deal only with the single question whether the

defendant was guilty of a trespass in the use of a viaduct constructed for that purpose by the State under a statute, and which the defendant was obliged to use, whether it would or not. These considerations mark a material distinction between the *Lewis* case and the one at bar. This case is not embarrassed by any such elements as existed in the case referred to. I have quoted the findings upon which this case comes here, and so long as these findings stand in the case, I am unable to see how there can be any recovery.

There are two other questions in the case of minor importance, but which merit a brief notice. The plaintiff became the owner of the premises in question in November, 1891. The second floor of the block was devoted to a dancing hall and the third or top floor to lodging rooms. In 1893 the plaintiff leased the dancing hall to a tenant with the use of the lodging rooms for a long term of years, and in 1896 he leased to the same tenant the corner store and basement. This tenant was in possession, paying the stipulated rent for the premises at the time of the commencement of this action. It will be seen by the findings of the court that the plaintiff was allowed for the diminution in the rental value from February 16th, 1897. The damage to the rental value, if any, therefore, belonged to the tenant and not to the landlord as to that part of the property which was leased. The plaintiff, who was the landlord, lost nothing by the depreciation, because his rental was fixed long before the trespass began. It is only in those cases where the leasing takes place after the trespass or interference with the easements that the landlord is permitted to recover (*Kernochan* v. *N. Y. El. R. R. Co.*, 128 N. Y., 559; *Hine* v. *N. Y. El. R. R. Co.*, id., 571; *Kearney* v. *Met. El. Ry. Co.* 129 id., 76; *Witmark* v. *N. Y. El. R. R. Co.*, 149 id., 393).

(281) It must be apparent that at least with respect to the plaintiff's easement of access, it must have been greatly improved by the removal of the railroad from the cut and the grading and paving of the street below the elevated structure. How the change interfered with his easements of light and air it is difficult

to conjecture. But assuming that the findings of the court below in that respect are supported by some evidence, it is important to notice the line of proof given as to depreciation in rental and fee value. It appears from the record that the plaintiff called an expert who testified to the course of values in real estate on Madison and Lexington avenues and was asked if there was anything which should induce the upward tendency in value in these avenues since 1892, which would have obtained in Park avenue had there been no change in the railroad. The questions in regard to the course of values on both these streets were objected to as incompetent. The objection was overruled and the defendants' counsel excepted. It will be seen that the witness was required to institute a comparison between property on Park avenue and on these other avenues for the purpose of proving damages. Park avenue was concededly subject to a servitude as of right for the use and operation of the railroad. Whatever effect that use or operation had upon the abutting property, the defendants cannot be made liable therefor. The other two avenues mentioned were not subject to any such servitude, and it was, I think, improper to give proof under which the court was required to institute a comparison of values between property on these two avenues which were situated so differently from that upon the avenue where the railroad was rightfully constructed and operated. It may be that in the elevated railroad cases proof of this character was admissible for the reason, as has already been pointed out, that in those cases there was no servitude upon the street as against the abutting owner. If, in the case at bar, the defendant had no right to be in the street as against the abutter, then it may be that the proof would be admissible, but to compare the value of property on two avenues where there was no right to have or maintain a railroad, with property on another avenue
(282) where there was such a right, was improper and misleading.

The judgment should be reversed and a new trial granted, costs to abide the event.

MARTIN, J.:

Although there is a divergence of opinion among the members of the court as to some of the legal questions involved in this case, yet all agree that the statute (L. 1892, ch. 339) under which the acts complained of were performed is valid, and that the legislature did not transcend its powers in enacting it. It must also be admitted that all the acts of the defendants for which the plaintiff claims they are liable were performed under and in compliance with the direct and express mandate of that statute. That there was no encroachment upon or actual interference with the plaintiff's premises, and that the improvement was made for the benefit of the public and in a proper manner, are likewise practically conceded. Hence, the broad question presented is whether, in the absence of any statute providing for compensation, the defendants are liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damages or loss to which he must submit without other compensation than the benefit he derives from the social compact. It is well settled by many decisions of this court that acts which are authorized by an express enactment of the legislature and performed in good faith upon a work of a public character, do not render the persons performing them liable for consequential damages unless there is an absence of due care or skill in the execution of the work. In other words, an act done under express authority of law for a public purpose, if done in a proper manner, and the property of the individual is not taken or encroached upon, will not subject the party doing it to an action for its consequences whatever they may be, unless the
(283) law itself provides compensation for injuries of that character. This is the rule where public

works for the general welfare are constructed or operated.

Moreover, it seems to us that the principles of law relating to the change of the grade of streets, when lawfully made, are applicable in this case. Here the defendants possessed the right to maintain their railroad and run their trains along and over the street. With their rights, as they then existed, they were content. The sovereign power of the state, however, interfered for a public purpose by a law which expressly and specifically required the grade upon which the railroad was run on this street to be changed, and caused to be erected a steel viaduct upon which defendants were required to run their trains, so that every act of the defendants of which the plaintiff complains was required by express provision of law. Under these circumstances, it seems quite clear to us that the defendants, as they have not encroached upon the land of the plaintiff or in any way interfered with it, are not liable for any consequential damages the plaintiff may have sustained by reason of the defendants having obeyed the mandate of the statute. These views find support in the following authorities: *Lansing* v. *Smith* (8 Cow. 146); *Radcliff's Executors* v. *Mayor, etc., of Brooklyn* (4 N. Y. 195); *Wynehamer* v. *People* (13 id. 378, 401); *Davis* v. *Mayor, etc., of N. Y.* (14 id. 506, 522); *Bellinger* v. *N. Y. C. R. R.* (23 id. 42); *Selden* v. *D. & H. C. Co.*, (29 id. 634, 642); *Coster* v. *The Mayor, etc., of Albany* (43 id. 399, 415); *Brooklyn Park Comrs.* v. *Armstrong* (45 id. 234, 245); *Kellinger* v. *42nd St. & G. S. F. R. R. Co.* (50 id. 206); *Losee* v. *Buchanan* (51 id. 476, 480); *St. Peter* v. *Denison* (58 id. 416); *Clemence* v. *City of Auburn* (66 id. 334, 339); *Moore* v. *City of Albany* (98 id. 396, 407); *Uline* v. *N. Y. C. & H. R. R. R. Co.* (101 *id.* 98, 107;) *Conklin* v. *N. Y., O. & W. Ry. Co.* (102
(284) id. 107); *Cogswell* v. *N. Y., N. H. & H. R. R. Co.* (103 id. 10); *Heiser* v. *Mayor, etc., of N. Y.* (104 id. 68, 72); *Bohan* v. *P. J. G. L. Co.* (122 id. 18, 26); *Atwater* v. *Trustees Vil. of Canandaigua* (124 id. 602, 608); *Reining* v. *N. Y., L. & W. Ry. Co.* (128 id. 157); *Egerer* v. *N. Y. C. & H. R. R. Co.* (130 id. 108); *Benner* v. *A. D. Co.* (134 id. 156); *H. R. T. Co.* v. *W. T. & Ry. Co.*

(135 id. 393, 411); *Rauenstein* v. *N. Y., L. & W. Ry. Co.* (136 id. 528); *Hill* v. *Mayor, etc., of N. Y.* (139 id. 495, 501); *Folmsbee* v. *City of Amsterdam* (142 id. 118, 122); *Talbot* v. *N. Y. & H. R. R. Co.* (151 id. 155); *Sullivan* v. *Dunham* (161 id. 290, 298); *Huffmire* v. *City of Brooklyn* (162 id. 584, 589); *Uppington* v. *City of N. Y.* (165 id. 222, 228).

While in some of the cases cited the question here is not involved or decided, still, even in those cases the rule suggested has been recognized and admitted to be the existing law of this state.

Aside from the case of *Lewis* v. *N. Y. & H. R. R. Co.* (162 N. Y. 202) the only authorities upon which reliance is placed, to sustain a contrary doctrine, are the elevated railroad cases. While those cases have created a liability theretofore unknown, which we think should not be extended, still, it seems to us, they are not only clearly distinguishable from a case like this, but should be distinguished on the merits. In those cases, if correctly understood, the only authority the elevated railroad company had to appropriate the street was the consent of the legislature and the municipal authorities. There, there was no law prescribing what they should do or that required them to do it. Here, we have a valid statute which expressly and specifically provides what shall be done as to the change of the grade in this street or the erection of a viaduct, provides the manner in which it shall be done, and appoints, or provides for the appointment of, commissioners to carry the statute into effect. It then directs that upon the completion of such viaduct, the defendants shall run their trains over it. Thus in one case we have a mere consent or permission by the public authorities, while in the other we have an express and mandatory statute requiring the defendants to do precisely what they did, and of which the plaintiff now complains.

(285) It seems to us that this distinction requires us to apply the general principle applicable to such a case and not the special law that has been created by the decisions in the elevated railroad cases.

While I agree generally with the views expressed by Judge O'Brien, I still think that the decision about to be

made can be said to be in conflict with the *Lewis* case, and to such extent as it is, the *Lewis* case should be regarded as limited.

CULLEN, *J.* (dissenting).

I dissent from the decision about to be made because I regard it as not only inconsistent with our recent decision in the case of *Lewis* against this defendant (162 N. Y. 202), but as opposed to the prevailing law of this state. Four propositions are settled law with us: 1. That the damage inflicted on an abutting owner by a change in the grade of a street does not constitute a taking of property within the meaning of the Constitution, and that the abutter is not entitled to compensation for such injury unless some statute awards it. (*Radcliff's Exrs.* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Talbot* v. *N. Y. & Harlem R. R. Co.*, 151 id. 155.) 2. That the use of the surface of a street or highway for the purpose of a railroad does not invade any property right of an abutting owner who has no title to the soil of the street. (*Kellinger* v. *F. S. St. & G. S. F. R. R. Co.*, 50 N. Y. 206; *Forbes* v. *R. W. & O. R. R. Co.*, 121 id. 505.) 3. That an abutter has an easement in the street for the purposes of light, air and access; that the erection of an elevated structure for the purpose of carrying a railroad thereon is an invasion of such easement and an appropriation of the abutter's property rights, for which, under the Constitution, he must be compensated. (*Story* v. *N. Y. El. R. R. Co.*, 90 N. Y. 122. See all the elevated railroad cases since that decision.) 4. That while the public authorities may raise the grade of a street for street use, or may authorize the construction of a surface railroad on the street, in either case without liability to abutters, they cannot raise the grade of
(286) a street for the exclusive use of a railroad without compensating an abutter for the injury inflicted. (*Reining* v. *N. Y. L. & W. Ry. Co.*, 128 N. Y. 157.) The circumstances which distinguish a case which falls under one rule from one which falls under

another rule are readily apprehended, and the rules are of comparatively easy application. Whether the difference in circumstance is such as to justify the distinction in principle which prevails in our state is quite another question. I admit that two rules of law, one of which declares that raising the grade of a street and the construction of a bank of solid filling opposite an abutter's premises is *damnum absque injuria*, and the other, which holds that the erection of an elevated railroad is an invasion of the property rights of an abutter which cannot be constitutionally effected without compensation, may seem somewhat inconsistent. But I intend not to be led into a discussion of that subject. It is sufficient to say that such is the settled law of the state, and that the rules which I have stated, consistent or not, exist in full force and integrity in our jurisprudence at this very time, and that on their authority we are deciding cases at almost every term of court. I may, however, remark in passing that if the attempt is made to harmonize the law on this subject, surely it should not be in the direction of extending the doctrine of *Radcliff's Exrs.* v. *Mayor, etc., of Brooklyn.* That case has been repudiated in many jurisdictions, and though firmly imbedded in the law of this state, the hardships occasioned by its application have been so great that in most cases legislative enactments have given abutters the right to compensation for their injuries. If while the legislature can authorize the laying of a surface railroad without compensation to the abutter, it cannot authorize the construction of a viaduct for an elevated railroad unless compensation be made to the abutter, it must be equally without power to transform a surface road into an elevated road without providing for such compensation. It necessarily follows that, notwithstanding the legislature might have authorized the grade of Fourth avenue to be raised to the height of the structure for the erection of which the plaintiff brings this action, without liability to abutters, that structure invades the plaintiff's property rights, an invasion for which he is en-

titled to compensation. To relieve the defend-
(287) ant from liability for such compensation it must trace its right to maintain the viaduct as against the abutter, not to the act of the legislature alone, but to a grant of some private property easement to which the plaintiff's title is subordinate or to prescription, which is merely the presumption of such a grant.

It is said that the legislature had power to authorize the improvement of Fourth avenue and to direct the railroad company to elevate its tracks. This cannot be doubted. But it could not relieve either the commissioners or the railroad company from paying for any private property taken for the improvement. If I am right in the proposition repeatedly held by this court that an abutter has an easement of light, air and access in a street as against all structures therein except those to be used for stricly street purposes, and as against all improvements save a change in the grade of the street itself, then the situation in no way differs from that which would have been presented had the legislature turned the railroad company off the street altogether and made it construct a new line on adjoining property. In either case the railroad company would be bound to pay for what it took. These propositions were not discussed in the *Lewis* case, but were assumed as settled by the previous decisions of this court and that decision could not have stood on any other foundation. What here has been written, there passed without the saying. In the *Lewis* case the defendant was held not to be answerable in damages until it began running its trains over the structure. This ruling did not proceed on the theory that the construction of the viaduct worked no trespass on the plaintiff's rights, but on the ground that the defendant did not participate in that trespass until it went into possession of the structure and ran its trains thereon. There is no inconsistency between the *Lewis* case and that of *Conabeer* against this defendant (156 N. Y., 474). The same learned judge that wrote in the earlier case concurred in the opinion delivered in

the later case. In the *Conabeer* case the trial
(288) court found as a matter of fact that no injury to the plaintiff's easement was occasioned by the new structure. In the *Lewis* case and in the present one the findings of fact are the exact reverse.

It is said that the trial court has found the structure to be lawful and that such finding is binding upon us. The finding is merely one of law and properly construed it is correct. An obstruction in a highway that would otherwise constitute a nuisance may be authorized by the legislature; but, of course, the party creating it would have no right to maintain it as against the owner of the soil of the highway. Yet the maintenance of the obstruction would be properly characterized as lawful, that is to say, as having the authority of law and as not being a nuisance. It is further contended that for the plaintiff to succeed, the statute authorizing this improvement must be held unconstitutional and that as no question of its constitutionality was raised in the trial court none can be raised here. The statute is not unconstitutional and no decision to that effect is necessary to secure the plaintiff's rights. If an act were passed by the legislature authorizing a corporation to construct a bridge across the Hudson river above Waterford, it would be unconstitutional because the Constitution prohibits the enactment of a special law for such purpose. If, however, the act authorized the construction of a bridge at the Highlands (the Constitution permitting special acts for bridges over the Hudson river below Waterford) it would not be rendered unconstitutional by the fact that the company did not own a rood of ground in either of the counties which border on the river at that point. The statute would simply be inoperative until the company acquired the necessary land.

As this is a dissenting opinion, I do not deem it necessary to discuss the extent of the right acquired by the defendant through private grant. It is sufficient to say that it is not greater than that carefully examined and considered in the *Lewis* case, and that it is of the same general character. If my difference with the majority of

the court related merely to that subject I should
(289) be content to confine myself to the record of my vote. It is against what I consider the broad and far-reaching doctrine of the prevailing opinion that I feel constrained to express the reasons for my dissent.

MARTIN, J., in memorandum concurs with O'BRIEN, J.; PARKER, Ch. J., and LANDON, J., concur with O'BRIEN and MARTIN, JJ.; BARTLETT and VANN, JJ., concur with CULLEN, J.

Judgment reversed, etc.

OPINION OF COURT OF APPEALS IN THE MUHLKER CASE, WHERE THEY OVERRULED THE LEWIS CASE PREVIOUSLY DECIDED BY THEM.

Court of Appeals.

HENRY MUHLKER, Respondent and Appellant,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY et al., Appellants and Respondents.
} 173 N. Y., 549.

Argued October, 1902, decided February, 1903.

PARKER, *Ch. J.*:

The facts in this case present the same question that was before this court in the *Lewis Case* (162 N. Y.
(551) 202) and the *Fries Case* (169 N. Y. 270) and that is, whether defendant is liable for any damages that may have been sustained by plaintiff by reason of the interference with his easements of light, air and access by the erection of the viaduct upon which its trains are now being run.

Defendant was incorporated in 1831, and in 1832 it took from one Poillon a deed to a strip of land 24 feet wide in the center of what is now known as Fourth avenue, in the city of New York, along which the premises belonging

to the plaintiff are situated. Subsequently double tracks were laid thereon and trains operated, and this continued until after 1872. In that year an act was passed (Ch. 702, Laws of 1872) under which the tracks were increased to four and were laid in a subway or cut bounded on both sides by masonry walls which rose to a height of three feet above the surface of the avenue. As soon as the work was completed the tracks were used for railroad purposes and so continued until the state compelled the road to abandon their use and to operate its cars upon the viaduct which was constructed by the state pursuant to ch. 339, Laws of 1892.

Without further reference to the history of the road in that avenue it may be said that prior to the time when the operation of its trains was transferred from the subway to the viaduct it had acquired the right as against the abutting owners to maintain its railroad and run its trains along and over Fourth avenue. (*Fries Case, supra.*)

In 1890 Congress passed an act directing the secretary of war to cause the bridges over the Harlem river to be replaced by other bridges which should be at least 24 feet above the high water of the spring tides. (U. S. Statutes at Large, vol. 26, p. 437.) As defendant's road crossed one of these bridges, compliance with the provisions of this act made necessary a change in the grade of defendant's railroads, and the act provided that such
(252) changes should be made as soon as the necessary legislation could be obtained to authorize a change in the grade of the approaches to the bridge.

About two years later the legislature passed the act already referred to by which it undertook to accomplish the result aimed at by Congress in such a manner as actually to improve the use of the street itself, a part of the scheme being to compel this defendant to operate its road upon a steel viaduct elevated above the ground, thus giving the public the use of the whole of the surface of the street which before was impossible.

This improvement was made by the state for the benefit of the public, the expense of it, by the mandate of the

State, being borne by the city and this defendant in equal proportions. What was done by the state and the legal effect of its action upon the rights of this defendant cannot be better stated than it was by Judge VANN in the *Lewis Case* (*supra*) and so I quote it:

"That structure was not erected by the defendants, but by the state, as appears from the facts already stated. South of 125th street it gave them no facilities which they did not have before. The stone structure of 1872 did away with grade crossings and gave them four tracks, and this is all they have now. The change of grade north of 125th street, in order to cross the Harlem river at the height required by the general government, has no bearing upon the change of grade south of that point. The defendants are liable for what they did but not for what the state did. (*Atwater* v. *Trustees of Vil. of Canandaigua*, 124 N. Y., 602.) The state created a board of experts and required them to make the improvement for the benefit of the public, giving them absolute control with no right on the part of the defendants to let or hinder. The board made the plans and did the work, letting their own contracts, employing and discharging their own men, without supervision or interference by the companies, which did not and could not set the board in motion, for
(553) the want of power, if for no other reason. The change of grade in front of the plaintiff's premises was not only for a public purpose, but was wholly in the interest of the public and not for the benefit of the defendants who had no power to prevent it. They simply paid one-half of the expense by the command of the statute, and, hence, under compulsion of law. They are not liable for the acts of the Park avenue board, which was not their agent, but a governmental agency of the state. (*Benner* v. *Atlantic Dredging Co.*, 134 N. Y., 156, and cases cited on page 162.) Their offer in advance to obey the statute did not affect its compulsive force, for obedience was their duty. As was tersely said in the late case, the railroad company 'had no choice left to it. The state intervened and directed that a work, which it had the power to require to be done, should be done, not by

the railroad nor even by the city, but by an independent board in the creation of which the defendant had no voice, over whose selection of employes it had no control, with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent.' * * * The statute 'authorized and directed' the defendants to operate their trains on the structure 'when completed.' Accordingly they laid their tracks, at first on the trestle work, which they used for a short time, and then on the steel viaduct, which they have used ever since. In thus using the work of the state they doubtless accepted it as their own, but they accepted it as a completed structure, and did not thereby become parties to the process of construction. Their acceptance did not reach back and adopt the previous acts of the state, but the effect was the same as if they had purchased it from the state on the day they commenced to use it."

Although at the time of the decision of the *Lewis* case we accepted as sound the proposition that, when defendant commenced to use the steel viaduct, it started a new trespass upon the rights of the abutting owners for which it could properly be held liable, subsequent reflection persuaded the majority of the court that this was error. The reasoning which seemed to command the latter
(554) conclusion was, briefly, that the state, setting about making improvements in Fourth avenue which were to benefit the general public, found defendant in possession of four tracks in the middle of the avenue, with the right to operate its trains upon them, which it was enjoying. The state could not if it would—and probably would not if it could—deprive defendant of its right to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway. So the state builded the viaduct over the part of the street formerly occupied by the subway and compelled it to stop running its trains in the subway and to run them on the viaduct instead. The state had the power to do these things and all of them, and defendant, having the right to move its trains over the street, which could not be taken away from it, did

not lose that right and become a trespasser because it obeyed the command of the statute, which it could not refuse to obey, to operate its trains upon the structure which the state had built.

The plaintiff was injured by the change, as appears from the findings. But who caused the injury? The defendant, which obeyed the command of the statute which it had not the right to resist, or the state, which had the power to make the changes which were made in the street and did make them and then compelled defendant to make use of them? The question admits of but one answer, and that is, it was the state.

When the question was again presented, therefore, as it was in the *Fries case* (*supra*), we attempted to cure the error which we concluded we had made in the *Lewis* case. The opinions in the *Fries* case were written by Judge O'Brien and Judge Martin. In the course of Judge O'Brien's opinion it is said:

"I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was but a consequence of the improvement, for which the railroad was not responsible. The law is well settled in this state that where the property of an abutting owner is damaged, or even his easements interfered with in
(555) consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases is held to be *damnum absque injuria.*"

Judge Martin states the principle as follows: "It must also be admitted that all the acts of the defendants for which the plaintiff claims they are liable were performed under and in accordance with the direct and express mandate of that statute. That there was no encroachment upon or actual interference with the plaintiff's prem-

ises, and that the improvement was made for the benefit of the public, and in a proper manner, are likewise practically conceded. Hence, the broad question presented is whether, in the absence of any statute providing for compensation, the defendants are liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill, and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damage or loss, to which he must submit without other compensaton than the benefit he derives from the social compact."

The judgment was accordingly reversed. That decision was deliberately and carefully made, and reflected the view of a majority of the members of this court at that time, and still does.

The dissenting opinion cited, and correctly, the *Reining Case* (128 N. Y. 157) as authority for the proposition that "while the public authorities may raise the
(556) grade of a street for a street use, or may authorize the construction of a surface railroad on the street, in either case without liability to the abutters, they cannot raise the grade of a street *for the exclusive use* of a railroad without compensating an abutter for the injury inflicted." But that proposition is not involved in this case. Here the state did not authorize a change in the street for the exclusive use of the railroad. The change was made for the public benefit as well as for that of the railroad, and for that reason the state compelled the city of New York to pay one-half of the expense of it.

The decisions in the elevated railroad cases are not in point. There no attempt was made by the state to improve the street for the benefit of the public. Instead, it granted to a corporation the right to make an additional use of the street, in the doing of which it took certain

easements belonging to abutting owners, which it was compelled to compensate them for.

It is again urged on this appeal that the act under which these changes were made is unconstitutional, and hence that defendant need not have obeyed its commands. But that question was considered and passed upon by this court in the *Fries* case, every member of the court, whether voting with the majority or minority, agreeing that the act was constitutional. Judge O'BRIEN said, in discussing the constitutional question: "I think it would be difficult, in view of the authorities cited, to state any ground upon which it can be questioned." And Judge MARTIN commenced his opinion by saying: "Although there is a divergence of opinion among the members of the court as to some of the legal questions involved in this case, yet all agree that the statute under which the acts complained of were performed was valid, and that the legislature did not transcend its powers in enacting it." And Judge CULLEN said: "The statute is not unconstitutional and no decision to that effect is necessary to secure plaintiff's rights."

We still think, under the authority of *Radcliff's Executors* v. *Mayor, etc., of Brooklyn* (4 N. Y. 195) and the other cases cited by Judge MARTIN in his opinion in the *Fries* case, that the state had the power to make this improvement, as it did, without compensation to the
(557) abutting owners. Undoubtedly the state had also the power to provide in the act for compensation to abutting owners, and to apportion the expense incurred in the acquisition of the easements destroyed upon the defendant and the city of New York, as it apportioned the expenses of building the viaduct and making the other changes in the street; and it still has the power to authorize ascertainment of the damages to the abutting owners through its Court of Claims and to provide for their payment, and it may well be that it would be equitable for it to do so. But that it possessed the power to improve the street, as it did, for the benefit of the public, in the manner that it did, compelling abutting owners to bear so much of the burden of the improvement as re-

sulted from the partial destruction of their easements of air, light and access, we have no doubt. Indeed, if in the judgment of the legislature it had seemed wise and just to do so, it could have assessed a portion of the expense of the improvement upon the abutting owners instead of placing it all upon the defendant and the city.

The judgment should be reversed and the complaint dismissed, without costs.

BARTLETT, J. (dissenting).

This in one of a large number of cases brought against the defendant railroad companies to recover damages for the erection of the steel viaduct in Park avenue, extending from near 106th street to the Harlem river, and over which the defendants operate their railroad with some two hundred trains a day.

The plaintiff recovered three thousand dollars fee damages and fourteen hundred dollars rental damages from February 16th, 1897, to October 10th, 1900, which was the date of the trial. The former date, February 16th, 1897, is the day on which the defendant companies began running their trains. The judgment of the Appellate Division was entered on the 29th day of April, 1901.

The case of *Fries* against these defendants was not decided in this court until December 31st, 1901. (169 N. Y. 270.)

The plaintiff appealed from the judgment on the ground that he was limited in his recovery by an
(558) improper rule as to the measure of damages, the court holding that he was not entitled to recover damages prior to February 16th, 1897, the day the steel viaduct was completed.

The counsel for the defendants also appeals, contending that our decision in the *Fries* case is conclusive as to all questions presented in the case at bar, and nothing remains to be decided.

The counsel for the plaintiff attempts to distinguish these cases as follows: (1) That in the *Fries* case there was a finding that the defendants had "acquired the

right, without liability to the plaintiff, to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897," and in the case at bar there is no such finding; (2) that Fourth or Park avenue, in front of the premises in suit, was a public street prior to the defendants' entry into the same.

(The premises involved are situated at the northwesterly corner of Park avenue and 115th street, and the viaduct structure of iron and steel in front of these premises is about 59 feet wide, and consists of four tracks laid on a steel structure, having a mean elevation of about 31 feet above the surface of said avenue. Prior to the erection of this viaduct, the tracks in the subway were at the south line of the plaintiff's premises, about level with the surface of the avenue, and at the north line about five and one-half feet below it. This subway was completed and trains began to be operated in it in 1878); (3) that in the *Fries* case the act of 1892 was assumed to be constitutional, and in this case its constitutionality is controverted; (4) that the rule of *damnum absque injuria* has no application to this case.

The plaintiff contends that Fourth avenue was a public street at the time the Harlem Railroad Company, which is the lessor of the Central and Hudson, was organized.

Twenty-four feet of Fourth avenue, as it was then called, in front of the premises in question, were conveyed to the city July 24th, 1827, by Poillon.

In January, 1832 (the Harlem Railroad Company having been incorporated in 1831), Poillon conveyed
(559) to the Harlem Railroad Company 24 feet in Fourth avenue, but at that time he had nothing to convey; he also refers in that conveyance to, and sanctions the map of New York, filed by the commissioners in 1811 under the act of 1807.

So far as these premises are concerned, it would seem as if the only right the Harlem Railroad Company acquired in the street, if any, was a prescriptive one, that would be no broader than its actual occupation. (*Lewis Case*, 162 N. Y., 202.)

It is true that Poillon's deed to the city was never recorded, but this was not essential in order to create a highway. (*Driggs* v. *Phillips,* 103 N. Y., 77.) Furthermore, the Harlem Railroad Company could not be regarded as a purchaser in good faith and for a valuable consideration, and under the provisions of its charter and its agreement with the city, and the ordinance of the board of aldermen following the agreement, it would seem to have entered upon Fourth avenue under all the restrictions in these various documents contained, and was in no sense the exclusive owner of the fee of the street, getting title from a private grantor.

The charter of the company is found in the Laws of 1831. The agreement bears date January 9th, 1832, and the ordinance was passed by the board of aldermen on January 20th, 1832.

In less than twenty years after any of these tes the city began condemnation proceedings to widen Fourth avenue, which was then 100 feet wide, and it was proposed to add twenty feet on each side, which was condemned, and the 100 feet, representing the old street, was marked "ceded." It does, however, appear in some of these litigations that a decree of condemnation went in form against the Harlem Railroad Company as to the portion of the street occupied by it, declaring a condemnation in consideration of one dollar. This report was confirmed some time in the year 1850.

The changes in Fourth Avenue, as it was then called, and the railroad structure under the act of 1872, resulted in a new state of affairs as to the grade of the
(560) tracks, both on viaducts and in cuts, which were not completed until 1878. It therefore, follows that the contention of the defendants, as to undisputed title in the avenue, in front of the plaintiff's premises, cannot be maintained.

The claim that the act of 1892 is unconstitutional cannot be sustained.

If it be true that the defendants have no legal right, by reason of grant or prescription, to erect this steel viaduct to the height of 31 feet in front of the premises in ques-

tion, the effect of the act of 1892 is simply, as in the elevated railroad cases, to authorize the construction of this viaduct structure in the avenue, subject to the rights of abutting owners, to the extent that their easements of light, air and access have been invaded.

The mere fact that the act does not provide for compensation has no controlling effect. The legislative sanction to construct what would otherwise be a nuisance in a public street does not imply the power to take the easements of abutting owners, which are property, without compensation.

The fundamental error in the *Fries* case is the assumption that the doctrine of *damnum absque injuria* is applicable.

In the prevailing opinion in that case the learned judge said: "So we have the case of a change of grade in a street, which necessitated a change in the location of the railroads tracks, all made under a valid statute, and that alone is said to constitute the alleged trespass."

If this statement was correct, it would be too clear for argument that the doctrine of *damnum absque injuria* would apply to this case.

The fact is that there was no change of the grade in Park Avenue. The title of chapter 339 of the Laws of 1892 reads: " An act to regulate, improve and enlarge Park Avenue above 106th Street in the city of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, *and for the elevation of said railroad structure, and for changing the grade of said railroad,* and for the construction of a new railroad
(561) bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary *by reason of such change in structure and grade and increased elevation of bridge,* and for other purposes."

It is profitable at this point to consider in detail the history of this act.

The Federal government determined to raise the height of the bridge which was in use by the railroad companies.

The State of New York, as in duty bound, passed this act in question to carry out the change which Congress had decided should take place.

This act in brief directed that the grade of the Harlem Railroad Company's track should be raised between 106th Street and the Harlem river. This was done in order to accommodate it to the new bridge.

The mayor of the city of New York was authorized by section thirteen to appoint a board to be known as "The Board of the Park Avenue Improvement above 106th Street," whose duty it was to execute contracts and superintend the construction of said improvement. Upon the completion of the work the counsel to the corporation of the city of New York was required by section sixteen to apply to the Special Term of the Supreme Court in the first department for the appointment of commissioners to determine the area of assessment to raise money to pay for the bonds to be issued by the city in payment of its share of the work.

The act provided that the city of New York should pay one-half and the railroad company the other half of the cost of this work if it did not exceed a million five hundred thousand dollars; if it exceeded that amount the railroad company was to pay the entire excess.

As I understand the *Fries* case, the majority of the court held (1) that this was work of a public nature, and that the railroad company was not liable for injury to the easements of light, air and access unless there was a want of skill, or negligence, in the performance
(562) of the work; (2) that the principles of law relating to the change of grade of streets, when lawfully made, are applicable to this situation, and that the doctrine involved in the elevated railroad cases has no application.

The act upon its face shows that the legislature did not consider it was providing for a public work for which the state was to be liable. The provision that a small portion of the city and the railroad company shall pay between them the cost of this work, and if it exceeded a certain sum the excess should be paid by the railroad com-

pany, is conclusive evidence that it does not contemplate a public work, inflicting damages which can only be recovered under a special provision of law, or by showing negligence or want of skill in the performance thereof.

The raising of the bridge by act of Congress contemplated, it is reasonable to suppose, the making of the navigable tide waters of the Harlem river accessible to vessels of greater draught, with taller masts and smoke-stacks, thereby benefiting the city of New York and incidentally the great railroad corporations using this bridge they being interested in the growing prosperity of the municipality and the improved facilities for entering the city of New York by land and water.

These considerations and the details of the act already referred to, lead me to the conclusion that this work was not of the character assumed by the prevailing opinions in the *Fries* case. If it were of that character, then it was unjust, and even unconstitutional for the legislature to have imposed any portion of the cost of this work upon the railroad corporations and a small section of the city of New York included in an area of assessment to be fixed by commissioners.

We thus have a situation presented similar to that in the elevated railroad cases, to wit: An elevated structure in the center of a public street, extending in places to the height of thirty-one feet, for the express purpose of elevating the railroad tracks so as to connect with the new bridge.

In my opinion to hold that the act of 1892 provides for raising the grade of Park avenue, is judicial legislation, and introduced in the *Fries* case a fact not disclosed by the act itself, and not discussed at our bar when that case was argued.

(563)

These cases present a situation covered by the case of *Reining* v. *N. Y., L. & W. Ry. Co.* (128 N. Y. 157). While the case cited does not present facts similar to the one at bar, yet the principle involved is precisely the same.

It was there held that a municipality could not, under the guise of exercising the power to alter the grade of a street, appropriate a part of the street practically to the

exclusive use of a railroad company and cut off abutting owners without compensation from using any part of it in the accustomed way. In other words, this was a limitation of the power of the common council conferred upon it by the legislature in the city charter of Buffalo.

Judge ANDREWS, in applying the law of elevated railroad cases, as laid down in the *Story* case, said: "It is no longer open to debate in this State that owners of lots abutting on a street, the fee of which is in the municipality for street uses, although they have no title to the soil, are nevertheless entitled to the benefit of the street in front of their premises for access and other purposes, of which they cannot be deprived except upon compensation."

It was expressly held in the case cited that the erection of an embankment in the street, and running parallel therewith, and occupied by a railroad company, was not a change of the grade of the street.

That the legitimate change of the grade of a street, to the damage of abutting lot owners, is damage without injury, is the settled law of this state, but it involves a principle that has been condemned in many jurisdictions, and the hardship of which has been cured in some of the states by constitutional amendment providing for the payment of such damages. It is a doctrine which ought not to be extended.

I am of opinion that the law controlling the elevated railroad cases is applicable here, and that the de-
(564) cision in the *Fries* case reversed a rule of property under which millions of dollars have been paid out by the elevated railroad companies to abutting owners who had no title to the street.

The New York and Harlem Railroad Company is not vested with any title in Park avenue that permits it as the owner of real estate to erect this elevated structure without regard to the injury it may work upon the easements of light, air and access enjoyed by abutting owners. They must settle for damages caused by so much of the structure as exceeds established user.

In several of the cases now before us it appears that

the city received a conveyance of the fee before the railroad company took the deeds from grantors, who practically had nothing to convey. In another case there is a title under condemnation proceedings against an infant in 1830, presumably securing to the railroad company the right to operate its road on the strip twenty-four feet wide.

The details of the railroads' title were carefully and elaborately examined in the *Lewis Case* (*supra*).

I am of opinion that this invasion of the easements of abutting owners has vested in them a valid claim against the railroad company, and if this court adheres to its decision to the contrary, on the ground that it was a public work ordered by the state, then these damages are a valid claim against the state.

I have no disposition to urge, unduly, the reconsideration of the principles of law laid down in the *Fries* case. I understand that the court desires a full and free discussion of this entire question. I shall be content, if a result is reached in these cases adverse to the plaintiff, so long as I place myself on record as dissenting, on the ground that it reverses the *Lewis* case and adopts a principle that is at war with the long line of decisions in the elevated railroad cases and the established law of the state.

If this judgment is reversed it should be without costs.

I vote for affirmance.

CULLEN, *J.* (dissenting). I concur in the opinion
(565) of Judge BARTLETT and dissent from the decision about to be made. I feel that I am not precluded from taking this course by the previous decisions of this court, for against the authority of the *Fries* case may be fairly set off that of the *Lewis* case. But the court having on this appeal re-examined the whole question involved in both the cases cited, and determined that the plaintiff is not entitled to compensation for the injuries to his property complained of, I must hereafter subordinate my judgment to that of the majority, and shall

regard subsequent discussion of the question as foreclosed by the action of the court in the present case.

HAIGHT, MARTIN and WERNER, *JJ.*, concur with PARKER, *Ch. J.*, BARTLETT, *J.*, reads dissenting opinion, and CULLEN, *J.*, concurs in memorandum; GRAY, *J.*, not sitting.

Judgment reversed, etc.

OPINION IN THE KEIRNS CASE NOW BEFORE THIS SUPREME COURT FOR REVIEW.

Court of Appeals.

JOHN KEIRNS, Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al., Appellants.*
} 173 N. Y., 642.

Argued November, 1902; decided February, 1903.

Per Curiam.—Judgment reversed and the complaint dismissed, without costs, upon the authority of *Fries* v. *N. Y. & Harlem R. R. Co.* (169 N. Y., 270), and *Muhlker* v. *N. Y. & Harlem R. R. Co.* (173 N. Y. 549).

VANN, *J.* (concurring):

The plaintiff's property is in the next block to that in which the property of the plaintiff in the *Lewis* case was situated. (*Lewis* v. *N. Y. & Harlem R. R. Co.*, 162 N. Y. 202.) The essential facts of the two cases differ in no particular that would prevent a recovery in one unless they would also prevent a recovery in the other. Since the decision of the *Lewis* case, however, the *Fries* case has been before us, in which a new point in the litigation was discovered by a majority of the court that was not raised by counsel or considered by us in the former case. (*Fries* v. *N. Y. & Harlem R.R. Co.*, 169 N. Y. 270.)

The *Lewis* case was argued and decided upon the theory that the entry of the railroad company into Park avenue was in subordination to the legal title of the city; that by

user for more than twenty years the company obtained by prescription as against the abutting owners the right to maintain a permanent structure within the same limits and at the same height as previous structures, and to the extent of the company's user for twenty years
(643) asquired the exclusive right to interfere with the easements of light, air and access; that the railroad company could not be charged with the damages which the easements of the abutting owners suffered from the construction, itself, by a governmental agency, of the last structure, but that when the defendants used it they became liable from that time for such damages as the easements suffered from such user to the extent of the increased height of the third structure, after deducting the benefits received from increased facility of access.

On the other hand, the *Fries* case was decided upon the theory that, as against the abutting owner with no title to the avenue, the state had the right to require the grade upon which the railroad was run, to be changed; to cause to be erected a steel viaduct, and to compel the defendants to run their trains thereon, and in the absence of any statute providing for compensation, that they were not liable for remote or consequential damages sustained by the abutting owners.

This point, although radical, was entirely new, and had it been raised in the *Lewis* case might have resulted in a reversal instead of an affirmance. While the judgment of the court in that case was by the unanimous vote of all the judges who sat, and the judgment in the *Fries* case was by a bare majority, and while I regret the result reached in the latter as amounting to the confiscation of property belonging to abutting owners, and a gift thereof to railroad corporations, I now yield to it as establishing the law of the state, since the principle upon which it rests has been sanctioned and applied in another case by this court. (*Muhlker vs. N. Y. & Harlem R. R. Co.*, 173 N. Y., 549.)

I concurred in the dissenting opinion of Judge Cullen in the *Fries* case and should have concurred in that of Judge Bartlett in the Muhlker case had I sat when it was

argued, but I regard the question as now settled, and by the rule of *stare decisis* I am compelled to vote for reversal.

PARKER, *Ch. J.*, BARTLETT, HAIGHT, MARTIN and WERNER, *JJ.* (and VANN, *J.*, in memorandum), concur; GRAY, *J.*, not sitting.

Judgment reversed, etc.

OPINION IN THE KRIETE CASE.

Court of Appeals.

HEDEWIG KRIETE, Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants.
} 175 N. Y., 484.

Argued May, 1903; decided June, 1903.

Per Curiam:

We decide on authority of the *Fries Case* (169 N. Y., 270), and the *Muhlker Case* (173 N. Y., 549), that under the statute requiring the structure complained of the plaintiff has no remedy against this defendant.

The constitutionality of the statute being questioned, we hold (1) that it does not violate the State Constitution, (2) that it does not offend against that provision of the 14th amendment of the Federal Constitution providing that a person shall not be deprived of property without due process of law, and (3) that it does not contravene section 10 of article 1 of the Federal Constitution forbidding the impairment of the obligation of a contract.

The judgment should be reversed and the complaint dismissed, without costs.

PARKER, *Ch. J.*, O'BRIEN, HAIGHT, MARTIN, CULLEN and WERNER, *JJ.*, concur; GRAY, *J.*, not sitting.

Judgment reversed, etc.

There was no opinion of the Court of Appeals in the Birrell case now before this Court for review.